Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1994

TAHOE KEYS PROPERTY OWNERS' ASSOCIATION, a California non-profit mutual benefit corporation,

Petitioner,

v.

CALIFORNIA STATE WATER RESOURCES CONTROL BOARD; CALIFORNIA STATE REGIONAL WATER QUALITY CONTROL BOARD – LAHONTAN REGION; CALIFORNIA STATE RESOURCES AGENCY; AND DOES 1 through 25, Inclusive,

Respondents.

Petition For Writ Of Certiorari To The Court Of Appeal, State Of California

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This petition presents the important legal question of whether this Court's recent rulings in *Nollan v. California Coastal Comm'n*, 843 U.S. 85, 107 S.Ct. 3141, 97 L.Ed.2d 277 (1987) and *Dolan v. City of Tigard*, 512 U.S. ___, 114 S.Ct. 2309, 129 L.Ed.2d 304 (1994), limiting regulatory "possessory" exactions, apply to monetary fee exactions imposed as a condition precedent to the issuance of a building permit. The questions for review are:

(1) Whether the imposition of a Mitigation Fee, as a condition precedent to issuance of a building permit that does not mitigate the impacts caused by construction, violates the takings clause of the Fifth Amendment of the Constitution?

(2) Whether the imposition of a Mitigation Fee against a minority of Petitioner's members, as a condition precedent to the issuance of a building permit, while the majority built homes without paying the Mitigation Fee, violates the Equal Protection Clause of the Fourteenth Amendment?

(3) Whether the violation of Petitioner's constitutional rights under the Fifth and Fourteenth Amendments entitles Petitioner to injunctive relief against the State of California barring collection and expenditure of the Mitigation Fee?

PARTIES TO THE PROCEEDINGS BELOW

The parties to the proceedings before the California Court of Appeal were petitioner Tahoe Keys Property Owners' Association, a California non-profit mutual benefit corporation (appellant below) and respondents California State Water Resources Control Board, California State Regional Water Quality Control Board – Lahontan Region, California State Resources Agency, and Does 1 through 25, inclusive (appellees below).

The parties to the proceedings before the trial court (El Dorado County Superior Court) were the petitioner (then the plaintiff) and respondents (then the defendants).

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Petition For Writ Of Certiorari To The Court Of Appeal, State Of California

PETITION FOR WRIT OF CERTIORARI

TAHOE KEYS PROPERTY OWNERS' ASSOCIATION ("TKPOA"), a California non-profit mutual benefit corporation, petitions that a writ of certiorari issue to review the published opinion of the California Court of Appeal, filed March 20, 1994.

OPINIONS BELOW

The opinion of the California Court of Appeal, Third District, is published at 23 Cal.App.4th 1459, 28 Cal.Rptr. 734 (1994). The text of the opinion is reprinted in the Appendix ("Ap."), beginning at Ap. A (App. 1).

The order of the California Supreme Court denying TKPOA's Petition for Review was filed on June 16, 1994. The text of the order is reprinted in the Appendix, beginning at Ap. B, (App. 39).

The appealable order of the Superior Court of California, County of El Dorado, is unreported. The text of the order is reprinted in the Appendix, beginning at Ap. C (App. 40).

JURISDICTION

The Court has jurisdiction under 28 U.S.C. § 1257 and Supreme Court Rule 10(c):

> When a state court or a United States court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, ***or has decided a federal question in a way that conflicts with applicable decisions of this Court***. (emphasis added).

California Code of Civil Procedure § 904.1(6) provides an appeal may be taken "[f]rom an order granting or dissolving an injunction, or refusing to grant or dissolve an injunction." The Superior Court denied TKPOA's Request for Preliminary Injunction. Ap. C (App. 40) (Clerk's Transcript ("CT" 530). The California Court of

Appeal's opinion was filed on March 20, 1994. Ap. A. (App. 1). On May 6, 1994, TKPOA timely filed its Petition for Review with the California Supreme Court. Ap. D (App. 41). On June 16, 1994, the California Supreme Court entered its order denying review. Ap. B (App. 39).

The time to petition this Court runs from the first day after June 16, 1994. The last day to file this petition is September 14, 1994, under Supreme Court Rule 30.1 (computation of time) and Supreme Court Rule 13.1 (time for filing petition).

STATUTES INVOLVED

The Fifth Amendment of the United States Constitution:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Fourteenth Amendment of the United States Constitution:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are

> citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The text of California Regional Water Quality Control Board-Lahontan Region ("LAHONTAN") Resolution No. 82-8 is set forth in the Appendix, beginning at Ap. E (App. 79) ("LAHONTAN RESOLUTION").

The California Tahoe Regional Planning Agency ("CTRPA") (CTRPA represented herein by its successor in interest, State of California Resources Agency Secretary ("RESOURCES AGENCY")) Resolution No. 82-10 is set forth in the Appendix, beginning at Ap. F (App. 86) ("CTRPA RESOLUTION").

STATEMENT OF THE CASE

This petition presents the important legal question of whether this Court's recent rulings in *Nollan v. California Coastal Commission*, 843 U.S. 85, 107 S.Ct. 3141, 97 L.Ed.2d 277 (1987) and *Dolan v. City of Tigard*, 512 U.S. ___, 114 S.Ct. 2309, 129 L.Ed.2d 304 (1994) limiting regulatory "possessory" exactions, apply to monetary fee exactions imposed as a condition precedent to the issuance of a building permit. This question, which is of great legal significance to property owners, developers and governmental entities throughout the United States, has not specifically been addressed by this Court.

The scope of the takings clause has been clarified by this Court in several recent cases, including *Nollan, supra, Lucas v. So. Carolina Coastal Commission*, 505 U.S. ___, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992); *Yee v. Escondido*, 503 U.S. ___, 112 S.Ct. 1522, 118 L.Ed.2d 153 (1992) and *Dolan, supra*. The only remaining issue unanswered by this Court is whether monetary exactions imposed by a governmental entity are exempt from the takings requirements set forth in these significant cases.

This issue was raised last term in *Ehrlich v. Culver City*, 512 U.S. ___, 114 S.Ct. 2731, 129 L.Ed.2d 854 (1994). Since this Court remanded *Ehrlich* for reconsideration in light of *Dolan, supra*, it " 'flagged' [the remanded case] as one upon which the intervening decision may have some bearing. . . . " *Bush v. Lucas*, 647 F.2d 573, 575 (5th Cir. 1981), *aff'd*, 462 U.S. 367 (1983). However, the California Court of Appeal, recognizing the importance of this unanswered question, carved out an exception to this Court's regulatory takings rules. The California Court of Appeal held that *Nollan, supra*, applies only to "***possessory***" exactions, excepting monetary or non-possessory exactions. Ap. A (App. 18-22). Without this Court's intervention, California governmental entities may bypass this Court's mandate that exactions are prohibited unless an essential nexus and rough proportionality exists between the exaction and the development. California has simply elevated form over substance: money exactions are valid while "possessory" takings are not.

This action involves takings policy enforced by two California state agencies, CTRPA and LAHONTAN ("the

State"). The State contends it has acted properly by exacting a "mitigation fee" as a condition precedent to the issuance of building permits for single-family homes. The homes are intended to be built upon a man-modified marsh contiguous to Lake Tahoe. Ap. E, F, H (App. 79-85, 86-91, 110) (CT 19-21, 30-34, & 17) (CTRPA and LAHONTAN Resolutions and Map). The State reasons that since the proceeds will be used to mitigate wetland loss occurring from 1959-1972, TKPOA's members, seeking to construct homes over 30 years after alteration of the wetland, are the appropriate individuals to bear the economic burden. Since TKPOA's members did not cause the wetland loss to occur, nor does the construction of family homes result in any further wetland loss, TKPOA maintains that neither the "essential nexus" standard set forth in *Nollan, supra,* 107 S.Ct., at 85, nor the "rough proportionality" standard set forth in *Dolan, supra,* 114 S.Ct., at 2309 have been met, necessitating a declaration that the exaction violates the Fifth Amendment takings clause.

The California Trial Court, Court of Appeal and Supreme Court all upheld the exaction, but as noted in *Nollan* "the approach of California state courts to issues concerning takings jurisprudence has been inconsistent with nearly every other court." *Nollan, supra,* 107 S.Ct., at 3149, 3150. The exacted fee is not intended to mitigate the impacts of the proposed construction, rather the fee is imposed to mitigate the prior impacts of development by the original subdivider, acts that occurred over 30 years ago.[1] Ap. H (App. 100, 101).

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[1] The State has not sought compensation from the developer, the Dillingham Development Corporation.

The California courts adopted the State's argument that "it is most fair to have Tahoe Keys lot owners, rather than California taxpayers, pay for mitigating the pollution caused by the Tahoe Keys development."[2] Ap. G (App. 94) (Respondent's Brief, at 33). The Court of Appeal held:

> Since preservation of the area will confer benefits upon plaintiff and its members beyond those received by the general public, it is fair that they shoulder more of the burden . . . When coupled with the fact that the government can act to preserve the area only through regulation of landowners such as TKPOA and its members, these special benefits convince us that, without more, the challenged regulation does not unfairly single out plaintiff and its members when compared to the general public.

Ap. A (App. 26-27).

TKPOA petitioned the California Supreme Court for review, specifically requesting the Court defer its decision until guided by this Court's then pending decisions in *Dolan* and *Ehrlich*. Ap. D (App. 41). Nevertheless, just eight days prior to this Court's decision in *Dolan* and *Ehrlich*, the California Supreme Court entered its Order denying TKPOA's Petition for Review.

The reported Court of Appeal decision results in the violation of hundreds of TKPOA members' constitutional rights to be free of unreasonable governmental takings. Unless overruled by this Court, California courts will be

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[2] TKPOA categorically denies the development causes pollution.

guided by this reported decision, perpetuating the inconsistency in takings law between California courts and "nearly every other court." *See Nollan, supra,* 107 S.Ct., at 3149-3150.

The pertinent facts are as follows:

A. STATEMENT OF FACTS

TKPOA is the homeowners' association for a 750 acre +/- planned unit development composed of 26 subdivisions in South Lake Tahoe, California. Ap. H (App. 97, 98) (CT 3-4). Prior to 1959, pursuant to proper permits, a portion of the Truckee Marsh was improved with man-made lagoons, streets, curbs, gutters and *inter alia,* approximately 1600 home sites. *Id.* The subdivided lots sold for construction of single-family residences; the developer also built and sold townhouses. *Id.* The lagoons provide recreational access to Lake Tahoe. *Id.* The developer constructed a water treatment plant to maintain water quality within the inland lagoon system. *Id.*

After installation of the waterways and construction of subdivision improvements, approximately 800 of the 1249 single-family units were constructed; approximately 350 townhouses were also constructed. Ap. H (App. 97, 98) (CT 4). By 1982, all of the infrastructure and over 3/5ths of the approved homes had been built. *Id.*

B. STATE AGENCY RESOLUTIONS AUTHORIZING MITIGATION FEE

Prior to the 1982 building season (May 1-Oct. 15), Respondent LAHONTAN and CTRPA declared the Tahoe

Keys' planned unit development a stream environment zone ("SEZ") and prohibited those TKPOA owners of unimproved lots from building homes on their properly subdivided lots, without compensation. Ap. H (App. 98, 99) (CT 4-5). The prohibition was evidenced by the CTRPA and LAHONTAN Resolutions. Ap. E & F (App. 79-85, 86-91) (CTRPA Resolution, CT 19-21; LAHONTAN Resolution, CT 30-34).

The CTRPA Resolution provides that those TKPOA property owners who had not yet built on their home sites could construct homes so long as each property owner intending to build pay, as a condition precedent to the issuance of a building permit, the sum of $4,000 ("Mitigation Fee") into a "Mitigation Fund." Ap. F (App. 90) (CT 21). "The purpose of this fund is to accomplish projects which achieve a net reduction of nutrients equivalent to ***that generated by the Tahoe Keys Development.***" Ap. F (App. 90) (CTRPA Resolution) (emphasis added). "Partial mitigation of the natural treatment capacity, ***lost by the modification of the Truckee Marsh***, can be accomplished by various onsite and offsite mitigation measures or offsets with the Tahoe Keys Development or at other locations within the Lake Tahoe Basin. . . . " Lahontan, Ap. E (App. 82) (emphasis added). Both Resolutions recite in part that the Mitigation Fee is intended to offset the environmental consequences caused ***by the original developer of the Tahoe Keys planned unit development (pre-1972), not*** to offset any environmental consequences of the present owners' construction of a single-family residence on the owners' individual lot. *Id.*

LAHONTAN thereafter unilaterally adopted its own Resolution 82-8, which provides that the identical $4,000

Mitigation Fee collected from each TKPOA member be expended pursuant to different expenditure provisions than CTRPA. Ap. E (App. 89-85) (CT 32-33).[3] The State Resolutions affect approximately 600 TKPOA owners.

Neither Resolution recites *any* essential nexus, roughly proportional or otherwise, between the mitigation fee exacted and the construction of a single-family residence by the lot owner. Ap. E and F (App. 79-85, 86-91). Both Resolutions mandate that the fee imposed ***is to mitigate the original development by the subdivider***, not to offset any environmental harm caused by construction of a single-family home. *Id.* In addition, both Resolutions conclude that the construction by the individual owners must be fully mitigated separately from the mitigation fee.[4]

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[3] Both CTRPA and LAHONTAN regulate water quality at Lake Tahoe, along with the TAHOE REGIONAL PLANNING AGENCY ("TRPA"). *See* Public Law 91-148, 83 Stat. 360, as amended, Public Law 96-551, 94 Stat. 3233. The conflicts in the CTRPA and LAHONTAN resolutions reveal Respondent agencies were competitive in their desire to regulate the same activities; however, TRPA did not impose any TKPOA specific assessments. TKPOA's statutory objections as to the conflicts between the agencies' Resolutions, although raised below, are beyond the scope of this Petition.

[4] TKPOA submits this is a proper exercise of the State agencies' jurisdiction, consistent with this Court's decisions.

C. MITIGATION FUND

The Mitigation Fund now exceeds $1.5 million.[5] Ap. I (App. 117) (CT 50). Until recently, the State agencies simply collected the Mitigation Fee without any threat of expenditure. Ap. J (App. 144) (CT 164). After TKPOA filed its Complaint for Declaratory and Injunctive Relief, and Writ of Mandate, on July 12, 1991, the LAHONTAN Board instructed its staff to liquidate the Mitigation Fund. Ap. K (App. 172-188) (CT 191-200). It is noteworthy absolutely no expenditures from the Mitigation Fund occurred in the intervening years. Ap. L (App. 189) (CT 224).[6] TKPOA respectfully submits that its members paid the fee in the absence of the required essential nexus or rough proportionality required by the Constitution as interpreted by this Court's decisions, and therefore, they are entitled to its return.

D. THE LITIGATION

On February 15, 1991, TKPOA petitioned LAHONTAN to cease and desist from collecting the Mitigation Fee and to release the Mitigation Fund to TKPOA based on this Court's decision in *Nollan*. Ap. M (App. 192). On May 10, 1991, after hearing, LAHONTAN denied the petition. Ap. N (App. 200, 201).

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[5] The record indicates that at the time of the hearings, the Mitigation Fund was $1.5 million. As a result of interest and additional contributions by TKPOA members, the Mitigation Fund now exceeds $1.9 million.

[6] Although LAHONTAN has authorized expenditures, no actual expenditures have been made from the Mitigation Fund to date.

On June 10, 1991, TKPOA filed its verified Complaint seeking Declaratory and Injunctive Relief, and Writ of Mandate, supported by (among other issues) this Court's essential nexus analysis set forth in *Nollan*. Ap. O (App. 202-212) (CT 460 *et seq.*) TKPOA filed an Application for Preliminary Injunction and on August 12, 1991, The Hon. J. Hilary Cook entered his Order denying Preliminary Injunction. Ap. C (App. 40) (CT 530). The denial of the Preliminary Injunction is the subject of this Petition. A Preliminary Injunction is an appealable order. C.C.P. § 904.1(6).

On December 16, 1991, TKPOA appealed to the California Court of Appeal. On March 30, 1994, the California Court of Appeal affirmed the Trial Court, citing only pre-*Nollan* authority and ordered its opinion published. The Court of Appeal read *Nollan* to be consonant with the almost unlimited power to exact espoused by pre-*Nollan* California decisions. The Court of Appeal reasoned, in part:

> However, contrary to TKPOA's assertion, it is ***not necessary*** that the governmental interest relate solely to the land or project in question, nor is it necessary that the regulation be limited to remedying the specific contribution to the problem that will be attributable to the project in question. (*See Associated Home Builders etc., Inc. v. City of Walnut Creek* (1971) 4 Cal.3d 633, 638; *Ayers v. City Council of Los Angeles* (1949) 34 Cal.2d 31, 41.) Rather, it is established that the justification for a restriction is not limited to the needs or burdens created only by the proposed project. (*Remmenga v. California Coastal Com.* (1985) 163 Cal.Ap.3d 623, 628.) The decision in *Nollan* did not cast doubt on this latter point. It

> specifically stated that the state could consider the effect of the project 'alone, or by reason of the cumulative impact produced in conjunction with other construction.' . . . The vice in *Nollan* was that the condition imposed utterly failed to further the end advanced as justification and not that it was not confined to the specific effects of the project in question.

Ap. A (App. 24) (emphasis added).

This quote reveals the Court of Appeal's Opinion relies ***entirely*** on pre-*Nollan* California decisions distinguishing *Nollan*, disregarding the essential nexus test in its entirety. The Court of Appeal was apparently under the mistaken impression that unless an actual "possessory" taking of land is involved, the Nollan nexus test does not apply. *Id.*

REASONS FOR GRANTING REVIEW

The Court of Appeal's decision is contrary to this Court's holdings in *Nollan, supra, Lucas, supra* and *Dolan, supra*. The Court of Appeal holds that TKPOA's members must pay a Mitigation Fee to offset impacts ***they did not create***, thus freeing Respondents to expend the Mitigation Fund collected to date ***without any nexus*** between the exaction imposed and the construction of single-family homes. Moreover, the Court of Appeal has already determined that Respondents are likely to prevail on the merits concerning TKPOA's constitutional claims. Ap. A (App. 34).

The California Court's interpretation of mitigation fees in the *Nollan* context was before this Court last term in *Ehrlich, supra*. Ehrlich raised the issue:

> Whether Culver City's imposition of a $280,000 exaction as a condition of approval of a 30 unit town home project, imposed not to mitigate any impacts of the development project's burden on the community but to mitigate the loss to the community of a terminated and demolished privately owned business on privately owned real property, constitutes a taking under the Fifth Amendment?

Ehrlich, supra, Petition for Writ of Certiorari, at i. The exact same issue faces TKPOA's members: Whether Respondents' imposition of a $4,000 per lot exaction as a building permit condition, not to mitigate the impacts of the family home construction, but to mitigate pre-1972 impacts from the subdivider's original development of the marsh, constitutes a taking under the Fifth Amendment. The California Trial Court, Court of Appeal and Supreme Court all upheld the exaction, in *Ehrlich* and in TKPOA's case.

On June 27, 1994, this Court granted Certiorari in *Ehrlich*, and vacated the opinion by the California Court of Appeal, Second District, and remanded for reconsideration in light of the *Dolan* decision. *Ehrlich, supra*, 512 U.S. ___, 114 S.Ct. 2731, 129 L.Ed.2d 854 (1994). Although TKPOA requested that the California Supreme Court wait until this Court made its ruling in *Ehrlich* and *Dolan*, for this Court's guidance on this crucial issue, the California Supreme Court denied review a few days before this Court's decisions. Ap. B (App. 39). As is

indicated by the within California Court decisions, without this Court's express clarification concerning whether monetary exactions are exempt from the takings clause, the issue will continue to recur in the lower courts. Six hundred persons are affected in this single case!

ARGUMENT IN SUPPORT OF PETITION FOR WRIT

1. THE VIOLATION OF TKPOA'S CONSTITUTIONAL RIGHTS CONSTITUTES IRREPARABLE HARM

A. Exaction Of The Mitigation Fee Is Constitutionally Impermissible

(1) The Essential Nexus Test Under *Nollan* Has Not Been Met

Nollan and *Dolan* are dispositive. In *Nollan*, this Court held that a condition imposed precedent to development must be "reasonably related" to the impact of the proposed development. *Nollan, supra,* at 834. The Coastal Commission required the Nollans to grant a lateral public easement, ostensibly to further the public interest in providing public access to the beach, as a condition of granting the Nollans the right to replace their beachfront bungalow with a new three-bedroom home. *Id.*, at 828. The Court conceded that public access to the beach is indeed a legitimate public interest, but nonetheless declared the required exaction from the Nollans "utterly fails" to respond to the impact of the proposed new development. *Id.*, at 837. The Court concluded a sufficient

nexus between the imposed condition and impact of the proposed development had not been established. *Id.*, at 839, 840. The Court held the Commission abused its discretion by conditioning approval of the new development on the grant of a lateral access easement. *Id.*, at 841.

The Commission argued that the permit condition was justified under its police power. *Id.*, at 836. The Court agreed the condition would not constitute a taking under the Fifth Amendment as an exercise of police power *if* the requisite nexus was established. *Id.* Since the nexus between public access and construction of a larger residence was, at best, attenuated, the Court found the permit condition unjustified based on the Commission's police power, thus requiring the Commission to either pay for an easement under the Fifth Amendment or eliminate the condition. *Id.*, at 837.

In other words, if the condition is reasonably related to the impact of the development, the public agency's police power may be invoked to impose the condition without invocation of the takings clause of the Fifth Amendment. If the condition is remote, is not reasonably related, with no apparent cause and effect, a taking occurs compelling compensation. *Id.*, at 841-842.

A taking occurs here because the Resolutions disclose that new development **mitigates its own impacts** and the Mitigation Fee is designed to mitigate the impacts resulting from **pre-1972 development, without the required nexus**. Ap. E and F (App. 79-85, 86-91) (CT 19-21, 30-34). The "type of condition imposed" therefore does not mitigate the "type of impact caused by the development," nor

is the condition "reasonable and fair relative to the burden created" by the construction of a new single-family residence. *See Nollan, supra,* at 837.

The *Nollan* essential nexus test has not been met here. The burden is the claimed lost treatment capacity of the Truckee Marsh as a result of the original 1959-1972 dragline and fill by the developer. Ap. E and F (App. 79-85, 86-91) (CT 19-21, 30-34). The condition is payment of a Mitigation Fee by TKPOA members constructing new homes post-1982 (continuing to the present) of a Mitigation Fee to offset the pre-1972 burden (approximately 800 owners were previously permitted to build without payment of the Mitigation Fee.) *See* Ap. H (App. 99). Insofar as both Resolutions require, as a condition of approval, new development proposals to contain construction measures designed to offset the actual impacts resulting from the new development, the "essential nexus" requirement has been satisfied, and TKPOA concedes a nexus has been established between the "burden and the condition." Such is ***not*** the case here. Insofar as the Resolutions require TKPOA's **post-1982** builders of single-family residences to pay for **pre-1972** impacts, TKPOA contends the condition "utterly fails" to establish an essential nexus between the burden and the condition. *Nollan, supra,* at 387.

Distillation of the *Nollan* nexus analysis may be phrased rhetorically: Is the condition fair? TKPOA contends it is inherently unfair to isolate and tax only those owners that were not financially able or fortuitous enough to have constructed their homes prior to 1982 to bear the entire burden for pre-1972 activities in which they did not participate. TKPOA respectfully submits

neither the United States Constitution, nor the State Constitution permit a governmental entity to isolate a minority of owners within a development to pay for the claimed sins of the original developer, sins distant in time and unrelated to the actual environmental consequence of TKPOA's members individual development projects.

(2) The Regulatory Takings Test Set Forth In *Lucas* Has Not Been Met

Except for the mitigation fee provision, TKPOA's plight is remarkably similar to the facts in *Lucas v. So. Carolina Coastal Commission*, 505 U.S. ___, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992). Lucas purchased two lots when "he was not legally required to obtain a permit from the Council in advance of any development activity. His intention with respect to the lots was to do what the owners of the immediately adjoining parcels had already done: erect single-family residences." *Lucas, supra,* 120 L.Ed.2d at 808. Thereafter, the Commission adopted a resolution that prohibited construction to protect the So. Carolina beachfront. *Id.* Lucas sued alleging the construction prohibition constituted an uncompensated taking under the Fifth Amendment, citing to *Nollan.*

This Court in *Lucas* noted that a taking occurs when the land use regulation does not "substantially advance legitimate state interests or *denies an owner economically viable use of his land.*" *Lucas, supra,* at 813 (emphasis original). This Court held the regulation that prohibited construction of Lucas' residence, even if only temporary, was a taking under the Fifth Amendment. *Lucas, supra,* at 815. Here, the CTRPA and LAHONTAN Resolutions place

TKPOA's members in a similar situation as *Lucas*, except TKPOA's members can buy a permit. This is regulatory extortion, plain and simple.

TKPOA's members purchased lots in a previously developed subdivision with the expectation that they would be able to build their homes on the vacant lots, just as over 800 of their neighbors had done. Ap. H (App. 99) (CT 3-4). CTRPA and LAHONTAN thereafter passed resolutions declaring the lots were within a SEZ and unbuildable. Ap. E and F (App. 79-80, 87) (CT 5). Both Resolutions provide that if each TKPOA member who wishes to build a home pays a $4,000 mitigation fee to offset the loss of the marsh resulting from the original 1959-1972 development, then the members are allowed to build a home on their individual lots. Ap. E and F (App. 79-86, 86-91) (CT 19-21, 30-34). The Resolutions provide the mitigation fee is ***not*** to mitigate the impacts of the owners' construction on the individual lots which is already mitigated. Ap. E and F (App. 79-85, 86-91) (CT 19-21, 30-34). The State is attempting to force TKPOA's members to bear a public burden which, in all fairness and justice, should be borne by the public as a whole. *Armstrong v. United States*, 364 U.S. 40, 49, 80 S.Ct. 1563, 4 L.Ed.2d 1554 (1960). These facts are almost identical to the *Nollan* Court's analysis of improper regulation:

> The evident constitutional propriety disappears, however, if the condition substituted for the prohibition utterly fails to further the end advanced as the justification for the prohibition. When that essential nexus is eliminated, the situation becomes the same as if California forbade shouting fire in a crowded theater, but granted dispensation to those willing to contribute $100

> to the state treasury . . . [E]ven though, in a sense, requiring a $100 tax contribution in order to shout fire is a lesser restriction on speech than an outright ban, it would not pass constitutional muster. . . . In short, unless the permit condition serves the same governmental purpose as the development ban, the building restriction is not a valid regulation of land use but 'an out and out plan of extortion.'

Nollan, supra, at 689 (cite omitted).

The CTRPA and LAHONTAN Resolutions violate this Court's holding in *Lucas,* because they bar construction by TKPOA's members of their single-family homes without compensation. *Lucas, supra.* Nevertheless, the State attempts to avoid a taking by allowing construction upon payment of a mitigation fee. This is an "out-and-out plan of extortion." *See Nollan, supra,* at 689.

(3) The Rough Proportionality Test Has Not Been Met

In *Dolan v. City of Tigard,* 512 U.S.___, 114 S.Ct. 2309, 129 L.Ed.2d 304 (1994), this Court resolved the "question left open by [its] decision in *Nollan v. California Coastal Commission,* 483 U.S. 825 (1987), of what is the required degree of connection between the exactions imposed by the city and the projected impacts of the proposed development." *Id.,* 114 S.Ct., at 2312. Petitioner Dolan owned a plumbing and electric supply store and applied to the Respondent City of Tigard for a permit to redevelop her building site. *Id.,* 114 S.Ct., at 2313. The permit was

granted by the City subject to certain regulatory conditions, including dedication of a greenway and a pedestrian/bicycle path. *Id.*, 114 S.Ct., at 2314. Mrs. Dolan appealed to the Land Use Board of Appeals ("LUBA") arguing the essential nexus test articulated in *Nollan* had not been met. *Id.*, 114 S.Ct., at 2315. LUBA affirmed the conditions, finding a *"reasonable relation"* between the proposed development and the necessity for a greenway and bicycle path. *Id.* (emphasis added). The Oregon Court of Appeal and Oregon Supreme Court affirmed, both rejecting Mrs. Dolan's contention that the *Nollan* case abandoned the "reasonable relation" test in favor of a stricter "essential nexus" test. *Id.* Petition for Certiorari was granted based on the conflict between the Oregon decisions and this Court's *Nollan* decision. *Id.*, 114 S.Ct., at 2316.

In *Dolan*, this Court applied the nexus analysis required by *Nollan*. *Id.* 114 S.Ct., at 2317. In *Nollan*, this Court determined that if a regulation does not 'substantially advance' a legitimate state interest, there is a taking. A permit condition substantially advances a legitimate state interest if two conditions are met: (1) the government must be able to deny the permit outright; and (2) "the permit condition . . . [must] serve[ ] the same legitimate police-power purpose as a refusal to issue the permit." *Nollan*, 483 U.S. at 835-836. Therefore, a permit condition must bear an "essential nexus" to a legitimate police power purpose that could have been used to deny the permit outright. *Id.* This crucial test set forth in *Nollan* and followed in *Dolan* was ignored by the California Court of Appeal here. Ap. A (App. 15-22). The Court of Appeal decided that TKPOA's regulatory fee case is not

subject to the nexus analysis in *Nollan*. Ap. A (App. 26, 33).

The California Court of Appeal interpreted both *Nollan* and *Lucas* to only apply to regulations that include a "physical invasion of one's property, including the impairment of the right to exclude others from the property. . . . " Ap. A (App. 18-20). Notwithstanding the ban on TKPOA members' construction unless they pay the Mitigation Fee, the Court of Appeal held no physical invasion of TKPOA members' property rights occurs by these Resolutions. Ap. A (App. 19).

> There has been no physical invasion of plaintiff's property nor is there any suggestion that landowners have been deprived of all economically beneficial or productive use of the land. This case is not entitled to the heightened scrutiny that a physical taking would entail. Instead, the court will 'indulge [in] our usual assumption that the legislature is simply 'adjusting the benefits and burdens of economic life,' . . . in a manner that secures an 'average reciprocity of advantage' to everyone concerned.'

Ap. A (App. 22) (citing to *Lucas, supra*).

This reasoning ignores this Court's directive requiring an analysis whether the State may refuse to issue a permit outright. *Nollan,* 483 U.S. at 835-836. As noted in this Court's second footnote in *Nollan* "the right to build on one's own property . . . cannot remotely be described as a 'government benefit.' " *Nollan,* at 833, fn. 2; *see also Lucas, supra.* The State cannot bar TKPOA's members from constructing their single-family residences since they do not impact any legitimate police-power purpose.

Therefore, application of the first prong of this Court's *Nollan* test, without requiring an analysis of the required degree of connection decided in *Dolan, supra,* reveals the permit condition violates the takings clause. It is clear the Court of Appeal wrongly decided TKPOA's case.

This Court's regulatory takings analysis emphasizes that the use of the property is the issue, not the requirement for the use. As noted by Justice Stevens in his dissent in *Dolan,* many of the cases relied upon by the majority involved *fees:*

> "All but one of the cases involve challenges to provisions . . . requiring developers to dedicate either a percentage of the entire parcel . . . *or an equivalent value in cash . . . to help finance the construction of . . . parks or playgrounds. In assessing the legality of the conditions, the courts gave no indication that the transfer of an interest in realty was any more objectionable than a cash payment."*

Dolan, 129 L.Ed.2d at 326 (Stevens, J., dissenting) (emphasis added). Having concluded that neither *Nollan, supra, Lucas, supra,* or *Yee, supra,* set forth regulatory takings principles applicable to fee exactions, the Court of Appeal's constitutional analysis was pre-ordained to disharmony with *Dolan, supra,* and *Ehrlich, supra.* In *Ehrlich, supra,* the developer was required to pay two fees as a condition of issuance of a building permit: one to mitigate the impact of a land-use change ("mitigation fee") and the second in lieu of a requirement that art be placed on the project site. *Ehrlich, supra,* at 1742. The trial court held the mitigation fee was a taking in violation of the Fifth Amendment. The Court of Appeal reversed, finding that the higher standards set forth in *Nollan* and

Lucas do not apply to mitigation fee cases: "Monetary exactions compelled as a condition of approval must be only ***rationally related*** to the governmental purpose." *Ehrlich,* at 1749 (emphasis added). The California Supreme Court rejected Ehrlich's Petition for Review.

Last term, this Honorable Court granted Ehrlich's Petition for Writ of Certiorari, ordering the Court of Appeal's decision vacated and remanding for reconsideration in light of the *Dolan* decision. *Ehrlich, supra.* This Court's remand of the *Ehrlich* mitigation fee case certainly implies the *Dolan* standard applies to mitigation fee cases; however, as this Court has not rendered an opinion on the issue, TKPOA respectfully requests the Court grant TKPOA's Petition to finally determine this important and recurring constitutional issue.

B. Exaction Of The Mitigation Fee Denies TKPOA's Members Equal Protection

The Court of Appeal also rejected TKPOA's claim that the State agencies have denied TKPOA equal protection. The Fourteenth Amendment of the U.S. Constitution provides: "No State shall make or enforce any law . . . nor deny to any person within its jurisdiction the equal protection of the laws." Article I, Section 7, of the California State Constitution provides: "[A] person may not be . . . denied equal protection of the laws. . . . "

The equal protection test for takings is set forth in *Nollan*:

> If the Appellant were being singled out to bear the burden of California's attempt to remedy

> these problems, **although they had not contributed to it more than other coastal landowners,** the State's action, even if otherwise valid, might violate either the incorporated Takings Clause or the Equal Protection Clause.

Nollan, supra, at 835, footnote 4 (emphasis added). In interpreting the foregoing, the Ninth Circuit found that "the action might violate the equal protection clause if the property owner were singled out to bear the burden of remedying the problems California sought to correct." *Del Monte Dunes v. City of Monterey,* 920 F.2d 1496, 1509 (9th Cir. 1990), *see also Armstrong v. United States, supra,* at 49. This is exactly what the Court of Appeal did here. Only TKPOA's post-1982 homebuilders have been singled out to pay for "the problems California sought to correct" from pre-1972 development. *Id.*

Whenever a state official's acts are "malicious, irrational or plainly arbitrary," a claim exists for violation of substantive due process and equal protection. *Lockary v. Kayfetz,* 917 F.2d 1150, 1155 (9th Cir. 1990). TKPOA submits no rational reason exists to prohibit construction by post-1982 TKPOA members, unless they pay a $4,000 Mitigation Fee for pre-1972 development by the subdivider; these property owners are "singled out to bear the burden of remedying the problems" the State seeks to correct, problems occurring as a result of the activities of others, distant in time and distant in effect. **They are the only private property owners in the Tahoe Basin required to pay this fee.** Ap. P (App. 213-215) (CT 501).

Respondents attempt to remedy the alleged loss of a SEZ by imposing a Mitigation Fee against only a subclass of the public: TKPOA members, and within that

sub-class, a sub-sub-class composed of TKPOA members not fortunate enough to have built prior to 1982, ***members who had absolutely nothing to do with the alleged environmental loss***. Based on the above, it is evident the two Resolutions violate TKPOA members' right to equal protection. This is made more obvious by the following:

(1) Approximately 1150 TKPOA members were allowed to build without paying the Mitigation Fee. It was only after 1982 that Tahoe Keys' designation was changed to an unbuildable SEZ, even though the subdivision was already improved. Ap. H (App. 97-99) (CT 3-4). Thus, approximately 600 members were denied the right to build a residence unless they paid the Mitigation Fee, although the majority was permitted to build without the imposition of the fee.

(2) Both CTRPA and LAHONTAN Resolutions state the $4,000 Mitigation Fee is to mitigate the environmental damage allegedly caused by the original subdivider of the Tahoe Keys subdivision (pre-1972), not to mitigate the impacts of construction by TKPOA's members post-1982. Ap. E and F (App. 79-85, 86-91) (CT 19-21, 30-34). Even if Respondents have the legitimate goal to restore water quality lost by development, a goal emphasized by the Court of Appeal, the imposition of a Mitigation Fee on TKPOA members that did ***not*** develop the subdivision or fill the wetland unfairly singles them out to bear the economic burden to remediate conditions they did not create. As noted in *Dolan* "[o]ne of the principal purposes of the Takings Clause is 'to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a

whole.' *Armstrong v. United States*, 364 U.S. 40, 49 (1960)." *Dolan, supra*, 114 S.Ct., at 2316.

(3) Not only are TKPOA members singled out from other TKPOA members who constructed prior to enactment of the two resolutions, they are also singled out from all other developments in the Tahoe Basin. LAHONTAN's Executive Officer testified that the Mitigation Fee was not assessed against any other subdivision within LAHONTAN's jurisdiction. Ap. P (App. 213-215) (CT 501).

The permit condition (payment of the Mitigation Fee) was not imposed to mitigate the TKPOA member's actual construction impacts, but to mitigate the developer's acts of creating the development ***prior to*** the member's construction. Ap. E and F (App. 81-82, 87) (CTRPA Resolution, LAHONTAN Resolution). The within permit condition does not "serve the same governmental purpose as the development ban" and, thus, is likewise "an out-and-out plan of extortion." *Nollan, supra.*

2. TKPOA Is Entitled To A Preliminary Injunction For Violation Of Its Constitutional Rights

Respondents have been and are continuing to violate the Fifth and Fourteenth Amendments of the United States Constitution and Article I, Section 7, of the California Constitution by collecting and endeavoring to spend the Mitigation Fees. *Nollan, supra; Dolan, supra.* Violation of a constitutional right is irreparable harm that cannot be remedied by an action at law. *See Conover v. Hall*, 11 Cal.3d 842, 850, 114 Cal.Rptr. 642 (1974); *Brock v. Superior Court*, 12 Cal.2d 605, 610, 86 P.2d 805 (1939) "[I]t is a legal

commonplace that injunctive relief is available when constitutional rights are being violated, regardless of a damages remedy at law. . . . The very purpose of the right of preliminary injunction is to prevent the irreparable loss of rights before judgment." *Nat. Org. for Reform of Marijuana Laws v. Mullen*, 608 F.Supp. 945, 962, (D.C. Cal. 1985), *remanded on other issue*, 796 F.2d 276 (9th Cir. 1986); *accord* 11 Wright & Miller, *Federal Practice and Procedure* § 2948, p. 440, (1973, updated 1991) "When an alleged deprivation of constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary."; *Citicorp Services, Inc. v. Gillespie*, 712 F.Supp. 749, 753 (N.D. Cal. 1989) "[C]ourts in the Ninth Circuit have presumed irreparable harm from an ***alleged*** violation of constitutional rights." (emphasis added). As noted by this Court "[t]he basic guarantees of our constitution are warrants for the here and now and, unless there is an overwhelmingly compelling reason, they are to be promptly fullfilled." *Watson v. City of Memphis*, 373 U.S. 526, 533, 83 S.Ct. 1314, 10 L.Ed.2d 529, 532-533 (1963); *see also Elrod v. Burns*, 427 U.S. 347, 96 S.Ct. 2673, 2689-2690, 49 L.Ed.2d 547 (1976). Nevertheless, the Court of Appeal's decision states:

> In asserting the right to provisional relief TKPOA argued, essentially, that the fee is unconstitutional and if defendants are permitted to collect it pending trial then individual lot owners will be compelled to suffer, at least temporarily, the payment of an unconstitutional fee. To the extent this assertion involves the likelihood that TKPOA will prevail on the merits we will discuss it in a subsequent portion of this

> opinion. At this point, ***we will not presume irremediable injury or the inadequacy of legal remedies based simply on assertion of a constitutional theory for relief.***

Ap. A (App. 12) (emphasis added).

This finding is not cited to any authority and is in direct conflict with both federal and state law. *See Conover, supra; Brock, supra; Mullen, supra;* and *Citicorp, supra.*

Moreover, the Court is required to exercise its discretion "in favor of the party most likely to be injured. . . . If the denial of an injunction would result in great harm to the plaintiff and the defendants would suffer little harm if it were granted, then it is an abuse of discretion to fail to grant the preliminary injunction." *Robbins v. Super. Ct. (County of Sacramento),* 38 Cal.3d 199, 206, 211 Cal.Rptr. 398, 401 (1985).

TKPOA requests collection of the Mitigation Fee be suspended pending trial. In addition, TKPOA is asking only that the Mitigation Fund remain intact until the Court determines whether it has been lawfully collected.

Respondents will suffer no harm by the issuance of injunctive relief. Respondents have passively collected the Mitigation Fee and have not used any of the Mitigation Fund since 1982. Only after TKPOA filed its Complaint requesting Declaratory Relief and a Writ of Mandate did Respondents commence plans to immediately spend the money. Why the apparent hurry to spend the money before the Court can determine the constitutionality of collection and expenditure? Balancing

of the equities clearly and ineluctably tips the scale in favor of the issuance of an injunction.

CONCLUSION

TKPOA respectfully requests this Honorable Court grant TKPOA's Petition for Writ of Certiorari to the Court of Appeal, State of California. The Court of Appeal's published decision incorrectly holds that *Nollan* does not apply to a regulatory fee exaction as a condition precedent to issuance of a building permit. The Court of Appeal's reported decision declares *Nollan* inapposite to regulatory fee exaction cases, purporting to abridge the constitutional rule of law first articulated in *Nollan*, and followed and clarified in *Yee*, and *Dolan*. Over 600 people are now hostage to a Hobson's Choice: either pay the $4,000 Mitigation Fee for wetland loss they did not create or be barred from building their homes. TKPOA has sought relief at every level in the California state courts without redress. TKPOA respectfully requests relief from this Court of last resort.

Dated: September 14, 1994.

Respectfully submitted,

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APPENDIX A

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(El Dorado)

TAHOE KEYS PROPERTY OWNERS' ASSOCIATION, Plaintiff and Appellant, v. STATE WATER RESOURCES CONTROL BOARD et al., Defendants and Respondents.	C012562 (Super.Ct.No. SV91-0164) (Filed Mar. 30, 1994)

APPEAL from a judgment of the Superior Court of El Dorado County, J. Hilary Cook, J. Affirmed.

Feldman, Shaw, DeVore, Lewis S. Feldman and Deborah A. Palmer for Plaintiff and Appellant.

Daniel E. Lungren, Attorney General, Roderick E. Walston, Chief Assistant Attorney General, Jan S. Stevens, Walter Wunderlich, Assistant Attorneys General, and Daniel L. Siegel, Deputy Attorney General, for Defendants and Respondents.

The plaintiff Tahoe Keys Property Owners' Association (TKPOA) brought an action against defendants State Water Resources Control Board, State of California Regional Water Quality Control Board – Lahonton Region (Lahonton), and State of California Resources Agency

(Resources Agency),[1] seeking various forms of relief based upon its contention that a mitigation fee charged as a condition for obtaining building permits is unlawful. TKPOA unsuccessfully sought a preliminary injunction which would have precluded the defendants from collecting further mitigation fees and would have prevented them from making expenditures from the fund created by those fees which were previously collected. TKPOA appeals from the denial of its request for a preliminary injunction. We shall affirm.

FACTUAL AND PROCEDURAL BACKGROUND

In this appeal we do not have before us a fully developed factual record for two reasons. First, this is an appeal from the denial of a request for a preliminary injunction. A preliminary injunction is a provisional remedy and, except in unusual circumstances, a request for a preliminary injunction would not support a final determination on the merits. (See *Camp v. Board of Supervisors* (1981) 123 Cal.App.3d 334, 357.) Accordingly, a request

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[1] The official actions of which TKPOA complains were taken, in part, by the California Tahoe Regional Planning Agency (CTRPA). CTRPA has been statutorily deactivated and the secretary of the Resources Agency has been designated as successor of CTRPA for litigation purposes. (Gov. Code, § 67132.) Defendants point out that the secretary of the Resources Agency rather than the agency should have been the named defendant, but they do not object to consideration of the issues on this ground. Since we are concerned here with a land use regulation imposed by CTRPA, we will refer to CTRPA in the body of this opinion, although it is the secretary of the Resources Agency who now represents those state interests.

for a preliminary injunction does not contemplate a full trial on the merits. (*Ibid.*) Second, TKPOA is convinced that the decision of the United States Supreme Court in *Nollan v. California Coastal Comm'n* (1987) 483 U.S. 825 [97 L.Ed.2d 677] compels a decision in its favor and has thus approached this case as though it could be resolved as a question of law. As we shall explain, this case is not controlled by *Nollan* and on the record presented we find no error in the denial of TKPOA's request for preliminary injunctive relief.

Only a brief factual recitation drawn from the parties' submissions, including the verified complaint, is necessary. The area known as the Tahoe Keys consists of 26 subdivisions bordering on Lake Tahoe. The Tahoe Keys is a waterfront development which was created by extensive dredge and fill operations in what was formerly the Truckee Marsh. The development consists of individual lots on "arms of land" raised above the lake level by fill operations and surrounded by lagoons that meander through the development so as to give each lot owner access to the lagoons and through the lagoons to the lake. TKPOA is an owner's association representing 1,594 members who own property within the Tahoe Keys and that holds title to the common areas in the Tahoe Keys.

The Tahoe Keys development commenced in the spring of 1959 and continued during the 1960's. In 1970 the developer conveyed its interest in the common areas to TKPOA, and in a resolution Lahonton has stated that the modifications to the former stream environment zone (SEZ) were accomplished prior to 1972.

The Tahoe Basin is a unique natural environment.[2] "However, there is good reason to fear that the region's natural wealth contains the virus of its ultimate impoverishment." (*People ex rel. Younger v. County of El Dorado* (1971) 5 Cal.3d 480, 485.) By the late 1960's California, Nevada and the federal government were becoming increasingly aware of the degradation which was being and would be wrought by uncontrolled development of the region. In 1968 California and Nevada entered into the Tahoe Regional Planning Compact to regulate development. (See Gov. Code, §§ 66800-66801; Nev. Rev. Stat. (1973) §§ 277.190-277.230.) Congress gave its consent to the compact in 1969. (*Lake Country Estates v. Tahoe Planning Agcy., supra,* 440 U.S. at p. 394 [59 L.Ed.2d at p. 406].) The Tahoe Regional Planning Compact created the Tahoe Regional Planning Agency (TRPA). (*Ibid.*) At the same time our Legislature created the California Tahoe Regional Planning Agency (CTRPA) to attempt to maintain an equilibrium between the region's natural endowment and its manmade environment. (Gov. Code, § 67002.) In creating CTRPA the Legislature provided for its deactivation upon the adoption by TRPA of ordinances, rules and regulations which met the requirements of the regional compact. (Gov. Code, § 67131; *California*

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[2] Lake Tahoe is renowned for its clarity and it has been said that only two other sizable lakes in the world are of comparable clarity – Crater Lake in Oregon and Lake Baikal in what was formerly the Soviet Union. (See *Lake Country Estates v. Tahoe Planning Agcy.* (1979) 440 U.S. 391, 393, fn. 2 [59 L.Ed.2d 401, 405].) Only Lake Tahoe, because it is not protected as part of a national park and is readily accessible from large metropolitan centers, is so vulnerable to excessive urban development. (*Ibid.*)

Tahoe Regional Planning Agency v. Day & Night Electric, Inc. (1985) 163 Cal.App.3d 898, 906.)

Virtually contemporaneous with rising concerns over the degradation of the Tahoe Basin and the creation of TRPA and CTRPA, our Legislature enacted a comprehensive revision of our water quality control laws in order to provide for a statewide program for the control of the quality of all of the waters of the state. (Stats. 1969, ch. 482; see Gov. Code. § 13000.) The core of this new legislation was the Porter-Cologne Water Quality Control Act. (Wat. Code, § 13020 et seq. *See* generally Robie, *Water Pollution: An Affirmative Response by the California Legislature* (1970) 1 Pacific L.J. 2.) The new legislation retained from prior law the concept of enforcement of water quality objectives through nine regional boards, but gave the regional boards and the State Water Resources Control Board greater powers and duties to implement water quality policies. (See Robie, *supra*, 1 Pacific L.J. at p. 4.) Each regional board was required to formulate and adopt water quality control plans for all areas within its region, subject to approval by the state board. (Wat. Code, §§ 13240, 13245.) Lahonton is the regional board with jurisdiction over the Tahoe Basin. (Wat. Code, § 13200, subd. (h).)

In the early 1980's, at a time when structures had been built upon roughly two-thirds of the lots in the Tahoe Keys, both CTRPA and Lahonton classified the area as a stream environment zone under their respective regulations.[3] Such a

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[3] TKPOA states that the Tahoe Keys was designed to accommodate 335 townhouse units and 1,249 single-family residences. By 1981, before the actions at issue here, all of the townhouses and approximately 800 of the residences had been constructed.

classification would effectively preclude owners from obtaining development permits to construct dwellings on their vacant lots. TKPOA, on behalf of its members, asked CTRPA and Lahonton to reclassify the Tahoe Keys to a classification which would enable individual lot owners to obtain building permits. The record on appeal does not include the records of the administrative proceedings which led up to the reclassification of the Tahoe Keys by CTRPA and Lahonton. It does appear, however, that there were extensive scientific studies, negotiations, and hearings conducted by and between CTRPA, Lahonton and TKPOA before reclassification of the Tahoe Keys in 1982.

In 1982, by resolution No. 82-8, Lahonton reclassified the Tahoe Keys as a man-modified stream environment zone. The resolution contains factual findings in support of the reclassification. Included among Lahonton's determinations were findings that the modification of the upper Truckee Marsh resulted in significant reduction of the natural water treatment capacity of the zone and that substantial deterioration of Lake Tahoe had resulted, and that the construction and continuing operation and maintenance of the Tahoe Keys lagoons and peninsulas contributes significant quantities of nutrients to the waters of Lake Tahoe. The resolution imposes requirements for the buildout of the area. The requirement with which we are concerned here is that a mitigation fee of $4,000 be paid for each lot to be developed. The fees thus collected were to be used to establish a mitigation fund which would be used, with the participation of TKPOA, to accomplish projects designed to achieve a net reduction of nutrients entering Lake Tahoe equivalent to that generated by the Tahoe Keys development.

Also in 1982, by resolution No. 82-10, CTRPA reclassified the Tahoe Keys as a substantially altered stream environment zone. The CTRPA resolution included factual findings similar to the Lahonton resolution. CTRPA also imposed a $4,000 per lot mitigation fee on further construction.[4] The CTRPA resolution refers to a memorandum of understanding (MOU) that had been prepared to set forth the mitigation package proposed by TKPOA, which would include the requirement of a $4,000 mitigation fee.[5] It states that the mitigation fund thus established would be used to achieve a net reduction of nutrients equivalent to that generated by the Tahoe Keys and that priority would be given to on-site (within the Tahoe Keys) mitigation measures.

From the time of the Lahonton and CTRPA resolutions in 1982 until February 1991, TKPOA did not protest the imposition of mitigation fees and individual lot owners who obtained building permits paid their fees into the mitigation fund. During that time approximately

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[4] The mitigation fee imposed by CTRPA is not in addition to the fee imposed by Lahonton; rather, it is the same fee. It also appears that the fee includes a $750 fee imposed by TRPA. No issue is presented here with respect to any portion of the fee required by TRPA.

[5] TKPOA attached a copy of the MOU to its complaint. The MOU recites that it is an agreement between TKPOA, CTRPA, and Lahonton. The CTRPA resolution by which the Tahoe Keys was reclassified refers to the MOU. The Lahonton resolution does not refer to the MOU, but does reflect that TKPOA was to be an active participant in determining how the mitigation fund would be used. TKPOA asserts that the MOU was never formally executed by Lahonton.

300 residences were constructed and, with interest, the mitigation fund grew to approximately $1.5 million.

By letter dated February 15, 1991, TKPOA objected to the past and future imposition of the mitigation fee. It demanded that the mitigation fees which had been collected be refunded and that no such fee be imposed on future construction. Lahonton rejected TKPOA's demand by resolution No. 6-91-47. TKPOA commenced this action in June 1991.[6] TKPOA seeks to preclude CTRPA and Lahonton from collecting further mitigation fees and to require them to pay over to TKPOA the mitigation fund established from the fees previously collected.

TKPOA sought preliminary injunctive relief to restrain CTRPA and Lahonton from collecting any further mitigation fees and from making any expenditures from

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[6] TKPOA states that following Lahonton's rejection of its demand it commenced a proceeding for administrative review by the State Water Resources Control Board pursuant to Water Code section 13320, subd. (a). TKPOA concedes that it has not exhausted that remedy. However, citing *National Audobon* [sic] *Society v. Superior Court* (1983) 33 Cal.3d 419, at pages 450-451, TKPOA asserts that the courts have concurrent jurisdiction over water issues. TKPOA asked the trial court to exercise its jurisdiction and to restrain further administrative proceedings pending resolution of the litigation. *National Audubon Society* is not squarely on point, since that case was concerned with water rights rather than water quality under the Porter-Cologne Water Quality Control Act. However, the defendants have not complained that TKPOA has failed to exhaust its administrative remedies and in view of our conclusion in this appeal that is not a question we must consider.

the mitigation fund pending trial.[7] The trial court denied the request for preliminary injunctive relief and TKPOA appeals. [sic]

DISCUSSION

"The law is well settled that the decision to grant a preliminary injunction rests in the sound discretion of the trial court." (*IT Corp. v. County of Imperial* (1983) 35 Cal.3d 63, 69.) The party challenging an order granting or denying a preliminary injunction has the burden of making a

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[7] TKPOA asserts that no expenditure was made from the mitigation fund until this litigation was commenced, at which time Lahonton began to take action on proposed expenditures. Although it appears uncontroverted that no expenditure had been made before this litigation, it does not appear that Lahonton engaged in a sudden rush to spend the fund in light of the litigation. In fact, for several years the parties, with the active participation of TKPOA, had been engaged in negotiations, studies, and workshops with respect to proposed mitigation projects. One project proposed by TKPOA had become the focus of the discussions. That project involved the circulation of Tahoe Keys water to the Pope Marsh as a means of filtering the water before it entered Lake Tahoe. The proposal required the participation and approval of the United States Forest Service, which suggested an initial pilot project to test the efficacy of the proposal before a decision on full implementation. Shortly after this litigation commenced Lahonton was scheduled to consider funding the pilot project from the mitigation fund. However, the project required the participation of TKPOA and in light of its demand for repayment of the mitigation fund it informed Lahonton that it would not participate if the pilot project would be funded through the mitigation fund. That effectively prevented implementation of the pilot project and it does not appear that approval of any other expenditure from the fund was imminent.

clear showing of an abuse of discretion. (*Ibid.*) An abuse of discretion will be found only where the trial court's decision exceeds the bounds of reason or contravenes the uncontradicted evidence. (*Ibid.*)

In determining whether or not to issue a preliminary injunction, a trial court must evaluate two interrelated factors. The first is the likelihood that the plaintiff will prevail on the merits at trial. The second is the interim harm the plaintiff may suffer if the injunction is denied as compared to the harm that the defendant may suffer if the injunction is granted. (*IT Corp. v. County of Imperial, supra,* 35 Cal.3d at pp. 69-70.) In thus balancing the respective equities of the parties, the court must determine whether, pending a trial on the merits, the defendant should or should not be restrained from exercising the right claimed by it. (*Ibid.*)

TKPOA sets forth several legal theories upon which it believes it is entitled to relief. While these legal theories require separate consideration with respect to the likelihood that TKPOA will prevail on the merits, the harm which TKPOA may suffer if provisional relief is denied is a factor which is common to the propriety of preliminary injunctive relief under every theory. Accordingly, before individually addressing the potential merits of TKPOA's theories, we will first address TKPOA's claim of interim harm by denial of preliminary injunctive relief.

The showing of potential harm that a plaintiff must make in support of a request for preliminary injunctive relief may be expressed in various linguistic formulations, such as the inadequacy of legal remedies or the threat of irreparable injury (compare Civ. Code, § 3422

with Code Civ. Proc., § 526),[8] but whatever the choice of words it is clear that a plaintiff must make some showing which would support the exercise of the rather extraordinary power to restrain the defendant's actions prior to a trial on the merits. (See *Jessen v. Keystone Savings & Loan Assn.* (1983) 142 Cal.App.3d 454, 459; *Voorhies v. Greene* (1983) 139 Cal.App.3d 989, 997; *Schwartz v. Arata* (1920) 45 Cal.App. 596, 601.) In general, if the plaintiff may be fully compensated by the payment of damages in the event he prevails, then preliminary injunctive relief should be denied. (*Ibid.*) Where, as here, the defendants are public agencies and the plaintiff seeks to restrain them in the performance of their duties, public policy considerations also come into play. There is a general rule against enjoining public officers or agencies from performing their duties. (*Agricultural Labor Relations Bd. v. Superior Court* (1976) 16 Cal.3d 392, 401; *Golden Gate S. T., Inc. v. San Francisco* (1937) 21 Cal.App.2d 582, 584-585.) This rule would not preclude a court from enjoining unconstitutional or void acts, but to support a request for such relief the plaintiff must make a significant showing of irreparable injury. (*Ibid.*)

TKPOA presented little evidence or argument that would support a claim of irreparable injury in the event of the denial of provisional relief. There was no evidence

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[8] The Civil Code refers to inadequacy of legal remedies rather than irreparable injury, but the Civil Code provisions with respect to injunctive relief govern only final injunctions and not preliminary injunctions. (Civ. Code, § 3421.) The Code of Civil Procedure, which governs both final and provisional relief, refers to irreparable injury. (Code Civ. Proc., § 526.)

to suggest that if defendants continue to collect the mitigation fee individual lot owners would be precluded from building upon or otherwise utilizing their property.[9] In the event TKPOA should prevail legal damages will be readily ascertainable and there was no evidence to suggest that if TKPOA prevails individual lot owners cannot be fully compensated by payment of those damages. In asserting the right to provisional relief TKPOA argued, essentially, that the fee is unconstitutional and if defendants are permitted to collect it pending trial then individual lot owners will be compelled to suffer, at least temporarily, the payment of an unconstitutional fee. To the extent this assertion involves the likelihood that TKPOA will prevail on the merits we will discuss it in a subsequent portion of this opinion. At this point, we will not presume irremediable injury or the inadequacy of legal remedies based simply on assertion of a constitutional theory for relief.

With respect to expenditures from the mitigation fund, TKPOA's showing was even more scant. The mitigation fund was established by the payment of fees by individual lot owners who built on their lots in the nine

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[9] TKPOA presented the declaration of Gregory A. Bennallack, an owner of an unimproved parcel within Tahoe Keys. He believes the mitigation fee is unconstitutional and unfair. He asserted the obvious, that if defendants are allowed to continue collecting the fee he will be unable to build upon his land without paying the fee. He did not suggest that continued collection of the fee would prevent or dissuade him from building upon his land and said nothing which would suggest that he could not be fully compensated by repayment of the fee in the event TKPOA prevails.

years between defendants' reclassification of the Tahoe Keys and TKPOA's objection to the fees. Repayment through the assessment of damages, the legal remedy, is the only relief that can be accorded those persons and an order enjoining expenditures from the mitigation fund will neither ameliorate their damages nor hasten their recovery. TKPOA's attempt to establish the potential of harm from a denial of provisional relief was based upon the assertion that in light of the state's budget difficulties it would appear that the state could not respond in damages if TKPOA prevails. We, like the trial court, find that assertion to be entitled to short shrift. Although it is common knowledge that the state has suffered through budgetary difficulties in the last several years (*see Department of Personnel Administration v. Superior Court* (1992) 5 Cal.App.4th 155, 163), the entire Tahoe Keys mitigation fund amounts to much less than .00003 percent of the state's annual general fund budget and there is no reason to believe that the state would be unable to reimburse any expenditures from the mitigation fund in the event it should be judicially determined that it must do so.

On the other side of the scale we consider the potential harm to defendants if a preliminary injunction is granted. Where, as here, the plaintiff seeks to enjoin public officers and agencies in the performance of their duties the public interest must be considered. (*Loma Portal Civic Club v. American Airlines, Inc.* (1964) 61 Cal.2d 582, 588; *Cota v. County of Los Angeles* (1980) 105 Cal.App.3d 282, 292.) In this instance the defendants are attempting to perform their legal duties to preserve or at least mitigate the degradation of Lake Tahoe and its environs caused by development. That is a matter of

significant public concern and provisional injunctive relief which would deter or delay defendants in the performance of their duties would necessarily entail a significant risk of harm to the public interest. If defendants are enjoined from making expenditures from the mitigation fund pending trial on the merits then they may very well delay or forgo mitigation projects with resulting harm to the public interest.[10]

With respect to TKPOA's request for an injunction against further collection of mitigation fees from individual lot owners, we find significant potential harm to defendants. TKPOA is acting in a representative capacity in seeking to restrain defendants from collecting mitigation fees from individual lot owners pending trial on the merits. No individual lot owner is a party to this action. Accordingly, if the defendants are provisionally restrained but ultimately prevail, the trial court will lack the ability to recompense defendants for the fees they will have been precluded from collecting in the interim. In that event the defendants will be relegated to the potentially expensive and time-consuming necessity of bringing multiple collection actions against individual lot owners in an effort to recoup their damages. This is a

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[10] Even in the absence of a provisional injunction the litigation itself is likely to have a chilling effect on defendants' use of the mitigation fund, since they will have to make their decisions with an awareness that if TKPOA prevails the mitigation fund will have to be repaid. However, that is a matter the defendants will have to consider in the exercise of their administrative discretion; it is a different matter to assert that they should be judicially enjoined from exercising that discretion.

compelling reason for denial of TKPOA's request for provisional relief against the collection of mitigation fees from individual lot owners. (*See Santa Cruz F. B. Assn. v. Grant* (1894) 104 Cal. 306, 308.)

Based upon these factors we find little risk of irreparable harm to TKPOA if provisional relief is denied and significant risk of harm to defendants if such relief is granted.

The next step in our analysis must be consideration of TKPOA's specific theories for relief and the likelihood that it will prevail on the merits. We turn now to those theories.

1. *Nollan v. California Coastal Comm'n.*

TKPOA asserts that the decision in *Nollan v. California Coastal Comm'n, supra,* 483 U.S. 825 [97 L.Ed.2d 677] is dispositive and compels the conclusion that the mitigation fee involved here is unconstitutional. We disagree.

In *Nollan,* the plaintiffs were the owners of a beach-front lot on which a small, dilapidated bungalow stood. They desired to demolish the bungalow and replace it with a three-bedroom house consistent with the neighborhood. The Coastal Commission agreed to issue a building permit provided the plaintiffs would agree to record a lateral public easement across the beach-front portion of their property.[11] On review the United States Supreme Court noted that the right to exclude others is an essential attribute of private property and concluded

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[11] The public easement sought by the Coastal Commission was "lateral" because it was not an access easement from the public road to the beach, but crossed the back or beach side of the plaintiffs' property from one private property to another.

that governmental action which vests outsiders with the permanent and continuous right to pass to and fro across a person's land is a taking of private property. (*Nollan v. California Coastal Comm'n, supra,* 483 U.S. at pp. 831-832 [97 L.Ed.2d at p. 686].) Since the taking of such an easement outright without compensation would violate the federal Constitution, the question became whether requiring the conveyance of the easement as a condition for issuance of a land use permit would alter the outcome. (*Id.* at p. 834 [97 L.Ed.2d at p. 687].)

In addressing the redefined question, the high court made it clear that a physical taking of property as a condition for issuance of a land use permit will not per se violate the Constitution, but will instead be subjected to heightened scrutiny. (483 U.S. at pp. 836, 841 [97 L.Ed.2d at pp. 689, 692].) In general, if the government could deny a use permit in the furtherance of a legitimate police-power purpose then it may exact a physical taking to serve the same purpose. (*Id.* at p. 836 [97 L.Ed.2d at pp. 688-689].) The government may act to regulate land use to serve a broad range of purposes. (*Id.* at pp. 834-835 [97 L.Ed.2d at pp. 687-688].) But to be valid as a land use regulation, a condition that results in a physical taking must " 'substantially advance[]' " some legitimate government purpose connected with the project at issue (*Ibid.*). This requires that the governmental purpose relate to the project at issue, and that there be a nexus between the condition and the governmental purpose. (*Id.* at p. 837 [97 L.Ed.2d at p. 689].) If the condition "utterly fails to further the end advanced as justification" then the

condition is not a valid land use regulation and becomes an unconstitutional taking. (*Ibid.*)[12]

In *Nollan*, the justifications given by the Coastal Commission were essentially specious. Indeed, the Supreme Court found it "impossible to understand" how the condition exacted by the commission furthered the public purposes advanced as justification. (483 U.S. at p. 838 [97 L.Ed.2d at p. 690].)[13] Accordingly, the taking as a condition for the issuance of a land use permit was invalid. (*Ibid.*)

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[12] Governments are vested with the power of eminent domain which enables them to take private property to serve any legitimate public interest, provided that the property owner is compensated for the taking. Accordingly, the mere assertion that a taking serves a public interest is not sufficient to support an uncompensated taking, since the Constitution specifically requires that compensation be paid in such circumstances. While the government may engage in legitimate land use regulation, it cannot be permitted to use the occasion of an application for a land use permit as an excuse of extort private property from its owner where the taking would otherwise require compensation. Accordingly, to support an uncompensated taking it must appear both that the public purpose have a relationship to the property or the project at issue and that the taking advances that public purpose rather than some purpose unrelated to the property or the project at issue. (*Ibid.*)

[13] The Coastal Commission asserted that the Nollans' new house would interfere with visual access to the beach, would somehow create a "psychological barrier" to beach use by interfering with the public's desire to use public beaches, and, somewhat inconsistently, would increase the use of public beaches thus creating the need for more beach access. The court accepted visual access as a legitimate public interest but noted that a lateral easement across the back of the Nollans' property could not alleviate that concern. The court appeared incredulous about the other justifications but did not specifically consider

TKPOA's assertion that the decision in *Nollan* is dispositive here cannot withstand scrutiny. In *Lucas v. So. Carolina Coastal Council* (1992) 505 U.S. ___ [120 L.Ed.2d 798], the United States Supreme Court noted that the "Takings Clause" reaches beyond a direct appropriation of private property and that while the use of property may be regulated, if the regulation goes too far it will be considered a taking. (505 U.S. at p. ___ [120 L.Ed.2d at p. 812].) In "Takings Clause" jurisprudence, the cases involving alleged regulatory takings fall into three categories: (1) where the owner is compelled to suffer a permanent physical invasion of his property; (2) where the owner is denied all economically beneficial or productive use of the land; and (3) where the owner is subjected to other regulatory restrictions on the use of the property. (*Id.* at pp. ___ - ___ [120 L.Ed.2d at pp. 812-813].) The first two categories of regulatory actions have been described by the court "as compensable without case-specific inquiry into the public interest advanced in support of the restraint." (*Id.* at p. ___ [120 L.Ed.2d at p. 812].) But most alleged regulatory takings fall into the third category and in such cases the court has eschewed rigid formulae, preferring instead to engage in ad hoc factual inquiries. (*Ibid.*) In making such inquiries the court will engage in the assumption that through the regulation the state is simply adjusting the benefits and burdens of economic life in an appropriate manner (*Id.* at p. ___ [120 L.Ed.2d at p. 814].) However, as we have

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whether they were sufficient to constitute a legitimate public interest because a lateral easement could not advance those interests. (*Ibid.*)

noted, in the relatively rare instance in which a case truly falls into one of the first two categories, compensation will be required without case-specific inquiry into the public purpose advanced in support of the regulation. (*Id.* at p. ___ [120 L.Ed.2d at p. 812].)[14]

In light of *Lucas* it appears that the first step in a "Takings Clause" analysis is to determine the type of case being considered. In *Lucas*, the regulation at issue forbade the plaintiff from any development of his land and the state court found this regulation deprived him of all economically beneficial or productive use of the land but upheld the restriction because it served a valid state interest. (*Id.* at p. ___ [120 L.Ed.2d at p. 809].) Since the findings of the state court placed *Lucas* squarely into the second category of takings cases, the Supreme Court held that inquiry into the legitimacy of the public purpose could not justify the restriction as a land use regulation and the matter was remanded for the consideration of other issues. (*Id.* at p. ___ [120 L.Ed.2d at pp. 822-823.) In making the remand, however, the high court made it

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[14] This does not mean that any governmental action that appears to fall into one of the first two categories is necessarily invalid unless compensation is paid to the property owner. For example, the state may enforce its statutes against public and private nuisances even if doing so deprives an owner of all economic use of the land. (*Id.* at p. ___ [120 L.Ed.2d at p. 821].) And the state may assert a public right of way that was a preexisting limitation upon the landowner's title. (*Ibid.*) The question in these instances is whether the use interests asserted by the landowner were part of his title to begin with, that is, whether they were part of the bundle of rights obtained with the title. (*Id.* at p. ___ [120 L.Ed.2d at p. 820].)

clear that cases of this nature are rare. If any economically beneficial or productive use is left to the landowner then the situation falls into the third rather than the second category. (*Id.* at p. ___, especially fn. 8 [120 L.Ed.2d at p. 815].)[15]

In a decision rendered between *Nollan* and *Lucas*, the high court considered the standards for determining whether a case falls into the first category of "Takings Clause" cases, that is, physical takings. In *Yee v. Escondido* (1992) 503 U.S. ___ [118 L.Ed.2d 153], the plaintiffs were owners of a mobile home park who contended that a local mobile home ordinance, in conjunction with the state's mobile home residency law, constituted a physical taking of their property. Together the laws restricted rents and rent increases, prohibited the owner from requiring the removal of a mobile home when it was sold, prohibited the owner from adjusting the rent or charging a transfer fee upon sale of the mobile home, and prohibited the owner from disapproving a purchaser who could pay the rent. The plaintiffs argued that the statutes and ordinances constituted a taking of their property by denying them the right to exclude others from their property and by transferring some of the value of the property to mobile home owner/tenants who would reap the benefit

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[15] In the ad hoc factual inquiry required for the third category of cases the extent to which a landowner is restricted in the use of the property is relevant in determining whether the regulation goes too far, but even where almost all of the economically beneficial or productive use of the property is prohibited a case-specific factual inquiry is still required. In short, whether a case falls into the second category is an " 'all-or-nothing' " matter. (*Ibid.*)

of frozen rents upon selling their mobile homes. The court rejected the claim that the laws constituted a physical taking, reasoning that (1) there was no compelled physical occupation because the decision to use the property as a mobile home park in the first instance was voluntary with the owner and, although it would take six to twelve months to do so, the owners could elect to change the use of the land; and (2) virtually all land use regulation involves a transfer of wealth and a transfer of wealth in itself does not convert regulation into physical invasion. (*Id.* at pp. ___ [118 L.Ed.2d at pp. 165-166].)

The decision in *Nollan* must be considered in light of *Yee* and *Lucas*. When we do so we perceive that the analysis in *Nollan* was actually directed to determining whether it would fall into the first or the third category of "Takings Clause" cases, that is, whether or not it was a physical taking case. There the Coastal Commission attempted to avoid the conclusion that a physical taking was involved by asserting that the taking was part of its regulation of land use. However, the court held that where the government accomplishes a permanent physical invasion through its land use regulations the courts must be "particularly careful" to ensure that the regulations substantially advance a legitimate state interest since there is a heightened risk that the purpose is the avoidance of the compensation requirement rather than the attainment of the stated police power objective. (*Nollan v. California Coastal Comm'n, supra,* 483 U.S. at p. 841 [97 L.Ed.2d at p. 692].) Stated another way, the physical invasion of one's property, including the impairment of the right to exclude others from the property, "will invite exceedingly close scrutiny under the Takings

Clause." (*Lucas v. So. Carolina Coastal Council, supra,* 120 U.S. at p. ___, fn. 8 [120 L.Ed.2d at p. 815].) The court assumed arguendo the legitimacy of the public purposes advanced as justification by the state in *Nollan,* but since the condition exacted utterly failed to advance those purposes it was nothing but an uncompensated physical taking.

Unlike *Nollan,* this case falls squarely into the third, catch-all category of "Takings Clause" cases. There has been no physical invasion of plaintiff's property nor is there any suggestion that landowners have been deprived of all economically beneficial or productive use of the land. This case is not entitled to the heightened scrutiny that a physical taking would entail. Instead, the court will "indulge [in] our usual assumption that the legislature is simply 'adjusting the benefits and burdens of economic life,' . . . in a manner that secures an 'average reciprocity of advantage' to everyone concerned." (*Lucas v. So. Carolina Coastal Council, supra,* 505 U.S. at p. ___ [120 L.Ed.2d at p. 814], citations omitted.) In this type of case, resolution of a challenge to the regulatory measure requires a careful case-specific factual inquiry. In short, the decision in *Nollan* is not dispositive and standing alone that decision does not establish that plaintiff is likely to prevail in this litigation.

2. Regulatory Taking.

As we have noted above, this case cannot be resolved without a case-specific factual inquiry. (*See Blue Jeans Equities West v. City and County of San Francisco* (1992) 3 Cal.App.4th 164, 171.) Alleged regulatory takings of this

sort "necessarily entail[] complex factual assessments of the purposes and economic effects of government actions." (*Yee v. Escondido, supra,* 503 U.S. at p. ___ [118 L.Ed.2d at p. 162].) Accordingly, such cases do not lend themselves readily to summary disposition without a fully developed factual record. (*Tahoe Regional Planning Agency v. King* (1991) 233 Cal.App.3d 1365, 1401.) Since in this type of case courts will generally assume the propriety of the land use regulation (*Lucas v. So. Carolina Coastal Comm'n, supra,* 505 U.S. at p. ___ [120 L.Ed.2d at p. 814]), it falls upon the plaintiff to establish its invalidity. And, although a request for a preliminary injunction does not contemplate a full trial on the merits, the party seeking the injunction must present sufficient evidentiary facts to establish a likelihood that it will prevail. (*IT Corp. v. County of Imperial, supra,* 35 Cal.3d at p. 69; *Camp v. Board of Supervisors, supra,* 123 Cal.App.3d at p. 357.) In view of TKPOA's erroneous belief that the decision in *Nollan* is dispositive, it did not engage in a full factual development of its challenge to the mitigation fee. We are relegated to determining whether, upon the scant factual record and such facts as we may judicially notice, it appears likely that TKPOA will prevail upon a trial on the merits.

In considering challenges to the validity of land use regulations of this type, we must initially consider whether the regulation substantially advances a legitimate state interest. (*Agins v. Tiburon* (1980) 447 U.S. 255, 260-261 [65 L.Ed.2d 106, 112].) This is a two-pronged question. First, it must appear that the government interest set forth as justification for the restriction reasonably relates to the property and/or project in question and

second, the restriction must reasonably serve that interest. However, contrary to TKPOA's assertion, it is not necessary that the governmental interest relate solely to the land or project in question, nor is it necessary that the regulation be limited to remedying the specific contribution to the problem that will be attributable to the project in question. (See *Associated Home Builders etc., Inc. v. City of Walnut Creek* (1971) 4 Cal.3d 633, 638; *Ayers v. City Council of Los Angeles* (1949) 34 Cal.2d 31, 41.) Rather, it is established that the justification for a restriction is not limited to the needs or burdens created only by the proposed project. (*Remmenga v. California Coastal Com.* (1985) 163 Cal.App.3d 623, 628.) The decision in *Nollan* did not cast doubt on this latter point. It specifically stated that the state could consider the effect of the project "alone, or by reason of the cumulative impact produced in conjunction with other construction." (483 U.S. at p. 835 [97 L.Ed.2d at p. 688].) And the decision concluded that the Coastal Commission could have imposed conditions on the Nollans that would have been directed at remedying the cumulative impact of their project and others. (*Id.* at p. 836 [97 L.Ed.2d 689].)[16] The

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[16] In *Nollan*, the Coastal Commission asserted, among other things, that the plaintiffs' project in conjunction with prior development would create a visual barrier to the shoreline. The court said that to remedy that problem the commission could have compelled the Nollans to grant a permanent easement for viewing purposes as a condition for issuance of a building permit. The compelled dedication of such a "viewing spot" would obviously have addressed the cumulative impacts of beach-front construction but would have fallen upon the Nollans alone, yet the court saw no constitutional obstacle sufficient to invalidate such a condition without a case-specific factual inquiry.

vice in Nollan was that the condition imposed utterly failed to further the end advanced as justification and not that it was not confined to the specific effects of the project in question. (*Id.* at p. 837 [97 L.Ed.2d at p. 689].)

The government may constitutionally engage in land use regulation to serve a broad range of interests. (*Nolan* [sic] *v. California Coastal Comm'n, supra,* 483 U.S. at pp. 834-835 [97 L.Ed.2d at p. 688].) The validity of the governmental interest in preserving the unique natural environment of the Tahoe Basin has been recognized by Congress and the Legislatures of California and Nevada, as well as by state and federal courts. (*Lake Country Estates v. Tahoe Planning Agcy., supra,* 440 U.S. at pp. 393-394 [59 L.Ed.2d at pp. 405-406]; *People ex rel. Younger v., County of El Dorado, supra,* 5 Cal.3d at p. 487.) Pollution of Lake Tahoe by virtue of development of the surrounding land is one of the obvious and primary dangers which led to the comprehensive regulation which has occurred. (*People ex rel. Younger v. County of El Dorado, supra,* 5 Cal.3d at p. 486.) Since the state's justification for the imposition of a mitigation fee upon Tahoe Keys property owners was to ameliorate the effects of pollution from the Tahoe Keys development, there can be no doubt that justification for the regulation at issue here does constitute an important state interest reasonably related to the development and build out of the Tahoe Keys.

The mitigation fee charged to TKPOA's members was calculated based upon estimates of the quantities of nutrients entering Lake Tahoe as a result of the development and continuing maintenance and operation of the Tahoe Keys subdivisions and lagoons. And the mitigation fund was specifically dedicated to partial mitigation of the

effects of that source of pollution through projects to abate or at least offset the polluting effects of the Tahoe Keys. Thus, on the face of the regulation there appears to be a sufficient nexus between the effect of the regulation and the objectives it was supposed to advance to support the regulatory scheme. (See *Yee v. Escodido, supra,* 503 U.S. at p. ___ [118 L.Ed.2d at p. 167]; *Nollan v. California Coastal Comm'n, supra,* 483 U.S. at pp. 834-835 [97 L.Ed.2d at pp. 687-688].)

In these circumstances our focus must turn to the question set forth by the United States Supreme Court in this manner: "[W]here the government merely regulates the use of property, compensation is required only if considerations such as the purpose of the regulation or the extent to which it deprives the owner of the economic use of the property suggest that the regulation has unfairly singled out the property owner to bear a burden that should be borne by the public as a whole." (*Yee* v. Escondido, *supra,* 503 U.S. at p. ___ [118 L.Ed.2d at p. 162]; see *also Nollan* v. *California Coastal Comm'n, supra,* 483 U.S. at p. 835, fn. 4 [97 L.Ed.2d at p. 688].)

While the public as a whole will doubtlessly benefit generally from the preservation of Lake Tahoe and its environs, we perceive no reason in the record to doubt that landowners in the area, such as TKPOA and its members, will benefit specially. After all, they are not simply transient visitors but plan to live there or at least have a concrete investment in the area. Since preservation of the area will confer benefits upon plaintiff and its members beyond those received by the general public, it is fair that they shoulder more of the burden. (See *White* v. *County of San Diego* (1980) 26 Cal.3d 897, 904; *City of*

Baldwin Park v. *Stoskus* (1972) 8 Cal.3d 563, 568.)[17] When coupled with the fact that the government can act to preserve the area only through regulation of landowners such as TKPOA and its members, these special benefits convince us that, without more, the challenged regulation does not unfairly single out plaintiff and its members when compared to the general public.

In its argument TKPOA compares its members to a class that is more limited than the general public, namely, other landowners in the Tahoe Basin. It asserts that the $4,000 mitigation fee applies only to the Tahoe Keys and that its members are thus singled out for payment of the fee. The scope of this argument is too narrow. Land use regulations need not apply across the board to everyone arguably concerned. Rather, the government is permitted to adjust the benefits and burdens of economic life in a manner the [sic] secures an average reciprocity of advantage. (*Lucas* v. *So. Carolina Coastal Council, supra,* 505 U.S. at p. ___ [120 L.Ed.2d at p. 814].) Land use regulations often have differing effects on neighboring properties and this fact alone does not invalidate a regulatory scheme. (*Yee* v. *Escondido, supra,* 503 U.S. at p. ___ [118 L.Ed.2d at pp. 166-167].) It follows that the fact that the regulatory restrictions imposed on one group are different in kind than the restrictions imposed on others does not in itself establish that the first group has been unfairly singled

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[17] The cited cases were concerned with the establishment of special assessment districts under California law. However, the legal standard for determining the validity of a special assessment district and that for determining the validity of a land use regulation as stated in *Yee, supra,* are strikingly similar and we find special assessment cases persuasive on this question.

out to bear the burden of the governmental objective. That question must be answered by reference to such things as danger to the public interest created by the land use aspirations of the different property owners, the extent of the burdens imposed on the different property owners when compared to the burdens imposed on others, and, where applicable, the nature of any special benefits which will accrue to the different property owners by virtue of the regulatory program.

Governmental efforts to regulate land use in the Tahoe Basin have been of an unusually comprehensive scope, with the basic concept being "to provide for the region as a whole the planning, conservation and resource development essential to accommodate a growing population within the region's relatively small area without destroying the environment." (*People ex rel. Younger* v. *County of El Dorado, supra,* 5 Cal.3d at p. 487.) To accomplish this purpose virtually all landowners within the basin have been required to submit to regulation of their land use aspirations. Many landowners would consider the restrictions upon their aspirations to be Draconian when compared to the payment of a substantial, but hardly confiscatory, mitigation fee. (See *Viso* v. *State of California* (1979) 92 Cal.App.3d 15, 19; *Sierra Terreno* v. *Tahoe Regional Planning Agency* (1978) 79 Cal.App.3d 439, 443; *Tahoe-Sierra Preserv.* v. *Tahoe Reg. Planning Agency* (9th Cir. 1990) 911 F.2d 1331, 1333-1334; *People of California* v. *Tahoe Regional Plan Agency* (9th Cir. 1985) 766 F.2d 1308, 1313-1314.) For example, as a result of the severe use restrictions imposed on landowners outside of the Tahoe Keys, many such landowners claim to have suffered significant diminution in the value of their properties, both

from an economic expectation perspective and from a market value perspective. (*Viso* v. *State of California, supra,* 92 Cal.App.3d at pp. 20-21 [alleged loss of $4.5 million from the property's value at its highest and best use]; *Sierra-Terreno* v. *Tahoe Regional Planning Agency, supra,* 79 Cal.App.3d at p. 443 [alleged drop in market value to no more than 25 percent of former value]; *Tahoe-Sierra Preserv.* v. *Tahoe Reg. Planning Agency, supra,* 911 F.2d at p. 1333 [claimed loss of all economically feasible uses of the land].)

On the other side of the ledger, we may consider the special benefits which will accrue to the parties. Through comprehensive land use planning in the Tahoe Basin the natural beauty of the region, and hence of the property of landowners in the basin, may be preserved. However, unlike many landowners, TKPOA's members will not be required to contribute to this end by forgoing their intended use of the land. Since TKPOA's members will be permitted to build residences upon their land, they are in a particularly advantageous position to reap the benefits of the regulatory program. In short, the preservation of the area will preserve the natural beauty that made their property desirable in the first place, that in turn will serve to maintain or enhance the market value of the property, and it is likely that the shortage of similarly situated properties that has been created or enhanced by governmentally enforced use restrictions will exert an upward pressure on market values of the homes in the Tahoe Keys.

When we consider the benefits and burdens of the regulatory program on a basin-wide basis based upon the

facts shown in the record and those which we may judicially notice, we cannot conclude that TKPOA has shown a substantial likelihood that it will succeed in establishing that its members have been unfairly singled out to the [sic] bear the burden of the governmental efforts to preserve the Tahoe Basin.

TKPOA also compares its members who have or will be required to pay the mitigation fee to members who built earlier and thus were not required to pay the fee. According to this argument the damage to Lake Tahoe from the Tahoe Keys development was caused by the original developer's dredge and fill operations and the consequent loss of the natural treatment capacity of the Truckee Marsh, most of the individual lot owners in the Tahoe Keys built upon their lots before CTRPA and Lahonton imposed the mitigation fee, and thus the remaining lot owners are forced to pay for all of the damage caused by development from which all lot owners benefited and that was caused by the original developer in any event.

The factual premises of this argument are not established in the record. Although CTRPA and Lahonton cited a loss of natural treatment capacity from the destruction of the Truckee Marsh, in their resolutions both agencies specifically found that continuing operation and maintenance of the Tahoe Keys subdivisions and lagoons contribute significant quantities of nutrients to the waters of Lake Tahoe. A computation of the mitigation fee was an attachment to the Lahonton resolution. Although full explanation of the computation would require testimonial evidence from the parties and probably from experts, on its face the computation appears to

refute TKPOA's assertions. Thus, the fee was based upon the total dissolved nitrogen entering the lake as a result of the Tahoe Keys development. Of the 2,920 kilogram total, only 300 kilograms were attributed to lost natural treatment capacity.[18] This was converted to an equivalent suspended sediment load and an equivalent cost of mitigation was determined using the 1981 cost of the last 50 percent of erosion control projects, thus indicating a contributory rather than complete mitigation charge. Of this total, 63 percent was assigned to TKPOA, again indicating a contributory basis for computation of the fee. The resulting sum was used to calculate a per lot mitigation fee for new construction. From this computation we cannot conclude that those lot owners who were or will be required to pay a mitigation fee have been forced to pay for all of the mitigation of all of the pollution entering the lake as a result of the development, nor that the damage they are required to mitigate is entirely, or even largely, attributable to the original developer rather than the continuing operation and maintenance of the Tahoe Keys subdivisions and lagoons.

In any event, a landowner cannot defeat a land use regulation simply by pointing to someone else who by prior use escaped the regulation, for otherwise there could be no land use planning. As a general rule, land use regulation must be prospective in nature because the

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[18] The figure for lost treatment capacity was "30% of 1000 kg/yr", apparently indicating that only 30 percent of the actual lost treatment capacity was used in the computation. This was added to 2,620 kilograms per year that was "contributed by current Tahoe Keys Development".

state is constitutionally limited in the extent to which it may, through land use regulation, affect prior existing uses. (See *HFH Ltd.* v. *Superior Court* (1975) 15 Cal.3d 508, 516; *Orinda Homeowners Committee* v. *Board of Supervisors* (1970) 11 Cal.App.3d 768, 775-776.) Accordingly, preexisting use is a constitutional line of demarcation in land use regulation and prior uses are protected while expectations and aspirations are not. (*Ibid.*) In other words, landowners have no vested right in existing or anticipated zoning regulations. (*Ibid.*) The alleged disparity between those who built before CTRPA and Lahonton commenced their comprehensive regulation of development of the Tahoe Basin and those who built or will build later is a matter which may enter into the complex factual assessment required to determine whether the regulation goes too far, but it does not in itself compel invalidation of the regulation.

In addition to these matters, the defendants properly point out that there is substantial doubt that TKPOA will even be allowed to proceed to the merits of its claim. It is significant that TKPOA engaged in extensive negotiations with CTRPA and Lahonton over the reclassification of the Tahoe Keys; that it proposed a mitigation fee as a condition of reclassification;[19] that it agreed to the conditions imposed

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[19] In its initial request to CTRPA and Lahonton for reclassification of the Tahoe Keys, TKPOA proposed the creation of a mitigation fund to support offsite mitigation measures to be funded by the assessment of $1,000 against new construction. Through negotiations the suggestion was altered in some respects, such as the amount of the fee, the manner of it [sic] collection, and the establishment of a priority for onsite mitigation projects. However, it does appear that the suggestion that a mitigation fee be imposed originated with TKPOA.

in the resolutions, including the mitigation fee; that it did not administratively or judicially challenge the resolutions in a timely manner; and that it accepted the benefits of the resolutions for nine years before making any objection to the mitigation fee. A landowner or his successor in title is barred from challenging a condition imposed in a land use regulation if he has acquiesced therein by either specifically agreeing to the condition or by failing to challenge its validity while accepting the benefits afforded. (*County of Imperial* v. *McDougal* (1977) 19 Cal.3d 505, 510-511; *Edmonds* v. *County of Los Angeles* (1953) 40 Cal.2d 642, 650; *J-Marion Co.* v. *County of Sacramento* (1977) 76 Cal.App.3d 517, 523; *Pfeiffer* v. *City of La Mesa* (1977) 69 Cal.App.3d 74, 78.) TKPOA has pointed to nothing which would indicate that this rule is not fully applicable to it in this instance.[20]

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[20] Even if we were to assume that this rule does not serve as a complete bar to TKPOA's claims, it still appears that TKPOA will be precluded from obtaining all of the relief it seeks. For example, it is regarded as fundamental that a landowner who obtains a building permit and complies with its conditions waives the right to assert the invalidity of the condition and thus TKPOA's members who paid the fee without protest will be precluded from pursuing a claim for refund. (*Pfeiffer* v. *City of La Mesa, supra,* 69 Cal.App.3d at p. 78.) And those members of TKPOA who paid the mitigation fee beyond the applicable statute of limitations will be time-barred from obtaining refunds. It also appears that TKPOA will be precluded from litigating some of the factual issues it asserts. For example, in connection with the request for reclassification CTRPA commissioned scientific studies to evaluate the impact of further development within the Tahoe Keys. TKPOA retained an expert to advise it with respect to the studies. Although TKPOA indicated that it was not in agreement with the results of the studies, it specifically elected not dispute the studies for purposes of its request for reclassification. That was a waiver of the right to contest the

Upon a consideration of the record, including the procedural hurdles TKPOA must overcome before addressing the merits of its claim and its preliminary showing upon the merits, we cannot conclude that TKPOA has established a significant likelihood that it will prevail on the merits after a full trial. In view of TKPOA's scant showing that damages are not an adequate remedy, we find no abuse of discretion in the denial of its request for preliminary injunctive relief on its constitutional claims.

3. Non-Constitution-Based Claims.

TKPOA's claim of irremediable injury in support of its request for preliminary injunctive relief was based primarily on the argument that its constitutional rights are being violated and that damages cannot be deemed an adequate remedy for constitutional violations. With respect to TKPOA's assertion of claims that are not based upon the Constitution, its showing of irremediable injury all but disappears. This is a substantial reason for denying provisional relief, at least in the absence of a strong showing of a substantial likelihood that TKPOA will prevail at trial. We find no such showing here and need only briefly discuss the nonconstitutional theories of relief.

TKPOA asserts that CTRPA should be enjoined from collection and expenditure of the mitigation fee and fund

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factual basis of the mitigation fee and even if TKPOA is permitted to challenge the reasonableness of the fee it will not be permitted to dispute the factual premise upon which the fee was imposed.

because it failed to obtain Lahonton's execution of the MOU reflecting the parties' agreement. We disagree. In challenging the imposition of the mitigation fee it is the resolution imposing the fee and not the MOU that TKPOA must attack. The CTRPA resolution referred to an MOU that had been prepared to set forth the mitigation package proposed by TKPOA, but neither the resolution nor the fee was made contingent upon execution of the MOU. In any event, if TKPOA believed execution of the MOU was essential that was a matter it could have and should have raised at the time. It cannot now challenge the resolution and fee on this basis. (See *Edmonds* v. *County of Los Angeles, supra,* 40 Cal.2d at p. 653.)

TKPOA asserts that Lahonton should be enjoined from making expenditures from the mitigation fund because it failed to execute the MOU. The Lahonton resolution was not contingent upon execution of the MOU. In fact, it did not refer to the MOU at all, although it did empower its executive officer to enter into any agreements necessary to ensure proper administration of the mitigation fund. As with the CTRPA resolution, if TKPOA believed that execution of the MOU was essential to the reclassification of the Tahoe Keys by Lahonton, that is a matter that could have and should have been raised at the time. (*Edmonds* v. *County of Los Angeles, supra,* 40 Cal.2d at p. 653.)

TKPOA asserts that collection and expenditure of the mitigation fees should be enjoined based upon conflicts between the CTRPA and Lahonton resolutions. We perceive no fatal conflicts. The MOU prepared to reflect TKPOA's proposal stated that it was the intent of parties that the mitigation fund be utilized for on-site mitigation

if such mitigation is best effective. The CTRPA resolution said that the fund would be used for on-or off-site mitigation measures, but said that priority would be given to on-site measures. It also provided that expenditure of the fund would be determined jointly between it, TKPOA, and Lahonton. The Lahonton resolution provided for mitigation measures within the Tahoe Basin, but clearly contemplated that approval of projects would be a joint endeavor between it and any other affected agency with the active participation of TKPOA. Under these circumstances expenditures under the CTRPA resolution and expenditures under the Lahonton resolution will not inevitably conflict. In the absence of a concrete proposed off-site project endorsed by Lahonton but rejected by CTRPA and TKPOA, there is no basis for judicial intervention.

TKPOA asserts that unless expenditure of the mitigation fund is enjoined, the defendants may make expenditures in violation of its right to participate in the determination of how the fund should be spent. We have noted that both resolutions contemplated the active participation of TKPOA in the decisionmaking process. On the record it appears that TKPOA did actively participate in discussion and negotiations concerning expenditure of the fund until it adopted the position that the mitigation fee was invalid and began proceedings to challenge the fee. TKPOA's right to participate in the decisionmaking process is satisfied if it is given the opportunity to do so; its refusal to participate as a litigation tactic cannot serve as the basis for enjoining CTRPA and Lahonton in the performance of their legal duties.

DISPOSITION

The order denying TKPOA's request for a preliminary injunction is affirmed. (*CERTIFIED FOR PUBLICATION.*)

SPARKS, Acting P.J.

I concur:

SIMS, J.

I concur in the result but write separately because I believe it is unnecessary for this court to consider the question whether plaintiff is likely to prevail on the merits at trial.

In determining whether to grant or deny a request for a preliminary injunction, the trial court must consider the likelihood that the plaintiff will prevail on the merits at trial and must weigh the interim harm to the plaintiff if the injunction is denied against the interim harm to the defendant if the injunction is granted. (*Cohen* v. *Board of Supervisors* (1985) 40 Cal.3d 277, 287.) Thus, the respective equities of the parties must be balanced to determine whether, pending a trial on the merits, the defendant should or should not be restrained from exercising the right it claims. (*Ibid.*) "When a trial court denies an application for a preliminary injunction, it implicitly determines that the plaintiffs have failed to satisfy either or both of the 'interim harm' and 'likelihood of prevailing on the merits' factors. On appeal, the question becomes whether the trial court abused its discretion in ruling on *both* factors." (*Id.*, at pp. 286-287, italics in original.) "Even if the appellate court finds that the trial court

abused its discretion as to one of the factors, *it nevertheless may affirm the trial court's order if it finds no abuse of discretion as to the other.*" (*Id.*, at p. 287, italics added.)

I agree with the majority's conclusion that the record shows little risk of irreparable harm to plaintiff if provisional relief is denied and significant risk of harm to defendants if such relief is granted. Therefore, the trial court did not abuse its discretion in denying the preliminary injunction. (*Cohen, supra,* 40 Cal.3d at pp. 286-287.)

Because the trial court's order may be affirmed on the interim harm analysis alone, I decline to consider whether plaintiff has shown it is likely to prevail at trial on its claim that the mitigation fee charged as a condition for obtaining building permits is unlawful.

SCOTLAND, J.

APPENDIX B

Third Appellate District No. C012562
S039720

IN THE SUPREME COURT OF
THE STATE OF CALIFORNIA
IN BANK
(Filed Jun. 16, 1994)

TAHOE KEYS PROPERTY OWNERS' ASSOCIATION,
Appellant

v.

STATE WATER RESOURCES CONTROL BOARD Et Al.,
Respondents

Appellant's petition for review DENIED.

The request for an order directing depublication of the opinion is denied.

Lucas
Chief Justice

APPENDIX C

SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF EL DORADO

DATE August 12, 1991. COURT MET AT ___ DEPARTMENT NO. A
PRESENT HON. J. HILARY COOK, Assigned JUDGE
JoAnn Ladd, DEPUTY CLERK
___, REPORTER ___, BAILIFF

TAHOE KEYS PROPERTY OWNER'S ASSOCIATION	)	**COUNSEL:**
vs.	)	
STATE WATER RESOURCES CONTROL BOARD, et al.	)	

NATURE OF PROCEEDINGS: ACTION NO. SV91-0164
MINUTE ORDER
(Filed Aug. 15, 1991)

Plaintiff's request for a Preliminary Injunction is denied.

DATED: August 15, 1991

/s/ J. Hilary Cook
J. HILARY COOK
Judge of the Superior Court
Assigned

cc: LEWIS FELDMAN, Esq., Feldman, Shaw & DeVore
STATE OF CALIFORNIA, Attorney General, Attn: Daniel Siegel, Deputy Attorney General, P.O. Box 944255, Sacramento, CA 94244-2550

APPENDIX D

SUPREME COURT OF THE STATE OF CALIFORNIA

TAHOE KEYS PROPERTY OWNERS' ASSOCIATION, A CALIFORNIA non-profit mutual benefit corporation, Petitioner, vs. STATE WATER RESOURCES CONTROL BOARD, STATE OF CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD – LAHONTAN REGION, and STATE OF CALIFORNIA RESOURCES AGENCY, and DOES 1 through 25, Inclusive. Respondents.	Case No.___ Trial Judge: The Honorable J. Hilary Cook El Dorado Superior Court Case No. SV91-0164 Court of Appeals, Third District 3 Civil No. C012562

PETITION FOR REVIEW

(Filed May 6, 1994)

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SUPREME COURT OF THE STATE OF CALIFORNIA

TAHOE KEYS PROPERTY OWNERS' ASSOCIATION, a California non-profit mutual benefit corporation, Appellant, vs. STATE WATER RESOURCES CONTROL BOARD, STATE OF CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD – LAHONTAN REGION, and STATE OF CALIFORNIA RESOURCES AGENCY, and DOES 1 through 25, Inclusive. Respondents.	Case No.___ Trial Judge: The Honorable J. Hilary Cook El Dorado Superior Court Case No. SV91-0164 Court of Appeals, Third District 3 Civil No. C012562 PETITION FOR REVIEW

TO: THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF CALIFORNIA

Petitioner TAHOE KEYS PROPERTY OWNERS' ASSOCIATION ("TKPOA") respectfully petitions this Court for review following the decision by the Court of Appeal, Third District, to affirm the trial court's decision denying TKPOA's Motion for Preliminary Injunction. TKPOA sought injunctive relief to prevent two California state agencies, the California Regional Water Quality

Control Board-Lahanton Region ("LAHANTON" [sic]) and the State of California Resources Agency ("RESOURCES AGENCY'), as successor-in-interest to the California Tahoe Regional Planning Agency ("CTRPA"), from exacting purported mitigation fees from TKPOA's members and expending the fees collected in violation of each agencies' adopted resolution, in conflict with each other's resolutions and in the absence of the constitutionally mandated nexus requirement, set forth in *Nollan v. California Coastal Commission* (1987) 43 U.S. 85 [107 S.Ct. 3141, 97 L.Ed.2d 277]. More importantly, in the absence of the requisite nexus, the exactions violate the constitional [sic] right of TKPOA's members to be free from regulatory takings without compensation, as set forth in *Nollan, supra.* Remarkably, the Court of Appeals held that *Nollan* does not apply to TKPOA and applied the pre-*Nollan* standard of review, reasoning the heightened scrutiny required by *Nollan* is not applicable to regulatory exactions. (Opinion, at pp. 17-19.) This issue is of great legal importance in that, if allowed to stand, all governmental agencies in California will be empowered to impose and collect exactions in violation of the Fifth Amendment to the U.S. Constitution and Article I, Section 19 of the California State Constitution.

I

ISSUES PRESENTED FOR REVIEW AND INTRODUCTION

1. ISSUES

This petition presents the important legal questions of whether the *Nollan* decision applies to California governmental agencies, whether our governmental agencies

can collect fees in violation of their own resolutions and whether governmental agencies can extract fees pursuant to their resolutions which conflict with another governmental agencies' resolutions. The issues presented herein are in conflict in the Court of Appeals, by other state high courts, and are currently before the U.S. Supreme Court in *Dolan v. City of Tigard* (1993) 317 Or. 110 [854 P.2d 437], *review pending*, U.S. Supreme Court Case No. 93-518, with an opinion to be issued by the U.S. Supreme Court on or before June 20, 1994. This Court's opinion on the issue is necessary to reconcile these conflicting opinions to settle California state law.

This Court has not ruled on the issue of whether the *Nollan* heightened scrutiny standard applies to all governmental regulatory takings cases, or whether the pre-*Nollan* standard may be applied in some cases. In this age where governments are attempting to fund public projects at the taxpayers' expense whenever possible, the taxpayers' right to be compensated for regulatory takings is under siege, and the Court of Appeals decision carves out a very large exception for governmental agencies to trampel on taxpayers' rights, contrary to the U.S. Supreme Court's pronouncements on the issue in *Nollan*, *Lucas v. So. Carolina Coastal Commission* (1992) 505 U.S. ___ [120 L.Ed.2d 277], and other regulatory takings cases.

The within petition seeks this Court's review of several related sub-issues:

(1) Should a California state agency be enjoined from prohibiting any construction on a private property owner's lot by regulation, then waive the prohibition in exchange for the payment of a fee via a new regulation?

The corollary of this issue is whether a state agency should be enjoined from expending the fees so collected.

(2) Should a California state agency be enjoined from violating its own resolutions?

(3) Should a California state agency be enjoined from enforcing its resolution when its resolution conflicts with a resolution previously adopted by another state agency?

(4) Does the nexus requirement articulated in *Nollan* bar collection and expenditure of the Mitigation Fee?

(5) Does the collection and expenditure of the Mitigation Fee violate TKPOA's members' rights to equal protection?

(6) Does the collection and expenditure of the Mitigation Fee Impair TKPOA's members, contractual rights?

(7) Is TKPOA entitled to an order enjoining the agencies from violating its constitutional, statutory and contractual rights pending trial on its Declaratory Relief action?

Both the trial court and the Court of Appeals held that no pre-trial injunction was warranted. Absent any direction from this Court, TKPOA's members are subject to paying fees that are: (1) unconstitutional under *Nollan*; (2) that violate governmental agency resolutions; or (3) conflict with other governmental resolutions. In addition, these state agencies are not barred from spending the already collected fees prior to TKPOA's Declaratory Relief trial.

In contrast to the Court of Appeals' decision, the New York highest court held that *Nollan* does apply to regulatory takings cases. (*Seawall Associates v. City of New York* (1989) 74 N.Y.2d 92 [542 N.E.2d 1059].) Also, a split in our appellate courts exists on this issue. (*See Surfside Colony, Ltd. v. California Coastal Comm.* (1991) 226 Cal.App.3d 1260 [277 Cal.Rtpr. 371].) Without this Court's reconciliation of this conflicting authority, the standard to be applied in regulatory takings cases in California is unclear. The resolution of the conflict is of great interest to the public at large and is unsettled. Unfortunately, the Court of Appeals decision escalates the confusion. It is extremely important that this Court resolve these conflicts and render a decision whether the *Nollan* standard applies to California state agencies.

2. NATURE OF THE CASE

Petitioner TAHOE KEYS PROPERTY OWNERS' ASSOCIATION, a California non-profit mutual benefit corporation, ("TKPOA") appeals the Appellate Court's affirmation of the trial Court's Order denying its Application for Preliminary Injunction. (CT, p. 530.)

3. PROCEDURAL HISTORY

On June 10, 1991, TKPOA filed its verified Complaint and Petition for Temporary Restraining Order and Order to Show Cause Why Preliminary Injunction Should Not Issue. (CT, pp. 1 *et seq.*) On June 14, 1991, the Complaint was amended, (CT, pp. 44 *et seq.*), and on June 18, 1991, TKPOA filed its Ex Parte Application for Temporary Restraining Order, (CT, pp. 96 *et seq.*) On June 19, 1991,

Respondents (Defendants) filed their Opposition. (CT, pp. 115.) On June 20, 1991, TKPOA's Application was denied by the Honorable Terrence R [sic]. Finney, and an Order to Show Cause was scheduled for June 26, 1991. (CT, p. 136.) By Stipulation, the Order to Show Cause was taken off calendar. (CT, p. 161.)

On July 9, 1991, TKPOA renewed its request for a Temporary Restraining Order based on LAHONTAN scheduling a Board Meeting to authorize the first expenditure of the Mitigation Fund since its creation in 1982. (CT, pp. 162 *et seq.*)[1] On July 11, 1991, the Honorable J. Hilary Cook denied the Petition for Temporary Restraining Order and scheduled a hearing on the Application for Preliminary Injunction for August 5, 1991. (CT, p. 360.)

On August 5, 1991, a hearing was held on the Petition for Preliminary Injunction. (CT, p. 529.) On August 12, 1991, Judge Cook entered his Order denying the Application for Preliminary Injunction. (CT, p. 530.) The denial of the Preliminary Injunction is the subject of this appeal.

II

STATEMENT OF FACTS

TKPOA is the homeowners' association for a 750 acre +/- planned unit development composed of 26 subdivisions in South Lake Tahoe, California. (CT, pp. 3-4.) Prior

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[1] TKPOA's Points and Authorities note that the reason the Preliminary Injunction was previously taken off calendar was based on a representation by LAHONTAN's counsel that no immediate expenditures from the Mitigation Fund were anticipated. (CT, p. 164.)

to 1972, the Tahoe Keys subdivisions were improved with man-made lagoons, streets, curbs, gutters, and other improvements. (*Ibid.*) The subdivided lots sold for construction of single-family residences; the developer also developed and sold townhouses. (*Ibid.*) The lagoons provide access to Lake Tahoe. (*Ibid.*)

After installation of the waterways and construction of subdivision improvements, approximately 800 of the 1249 single-family units were constructed; approximately 350 townhouses had been constructed. (CT, p. 4.) By 1982, over 3/5ths of the approved units were constructed. (*Ibid.*) Nonetheless, prior to the 1982 building season, (May 1-Oct. 15), Respondent LAHONTAN and CTRPA, declared the Tahoe Keys' subdivision a stream environment zone ("SEZ"), prohibiting those TKPOA owners of unimproved lots from building homes on their properly subdivided lots. (CT, pp. 4-5.) The prohibition was evidenced by CTRPA Resolution 82-10 and LAHONTAN Resolution 82-8. (CTRPA Resolution, at CT, pp. 19-21; LAHONTAN Resolution, at CT, pp. 30-34.)

CTRPA Resolution 82-10 provides that those TKPOA property owners that had not yet built on their subdivided lots may construct homes, notwithstanding the regulatory SEZ characterization of the area, so long as the property owner pay, as a condition precedent to a building permit, the sum of $4,000 ("Mitigation Fee" into a "Mitigation Fund." (CT, p. 21.) The Resolution recites in part that the Mitigation Fee is intended to offset the environmental damage allegedly caused by the original developer of the Tahoe Keys subdivisions (pre-1972). (*Ibid.*) This Resolution further provides that expenditure of the funds must be pursuant to a Memorandum of

Understanding ("MOU") executed by TKPOA, CTRPA and LAHONTAN, with priority for expenditures for on-site mitigation projects at Tahoe Keys. (*Ibid.*) The MOU described in CTRPA's Resolution was executed by CTRPA and TKPOA, but not by LAHONTAN. (CT, p.512.)

LAHONTAN refused to execute the MOU, and thereafter unilaterally adopted its own Resolution 82-8, which provides that the same $4,000 Mitigation Fee collected from each TKPOA member shall be spent in the Lake Tahoe Basin without any priority given to Tahoe Keys on-site expenditure and without any requirement for an MOU with either CTRPA or TKPOA. (CT, pp. 32-33.)

The Mitigation Fund now exceeds $1.5 million.[2] (CT, p. 50.) Until recently, the public agencies simply collected the money without any threat of expenditure. (CT, p. 164.) After TKPOA filed its request for declaratory relief, LAHONTAN instructed its staff to spend the money at its Regional Board Meeting held July 12, 1991. (CT, pp. 191-200.) It is noteworthy absolutely no expenditures occurred in the intervening years. (CT, p. 224.)

TKPOA seeks injunctive relief preventing expenditure of the Mitigation Fund or the continued collection of $4,000 for new construction pending resolution of the within action. (CT, pp. 460 *et seq.*) Examination of the two agency Resolutions reveals they are inconsistent and that expenditures from the Mitigation Fund would not only

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[2] The record indicates that at the time of the hearings, the Mitigation Fund was $1.5 million. As a result of interest and additional contributions by TKPOA members, the Mitigation Fund now exceeds $1.9 million.

exacerbate the inconsistencies, but would amount to expenditures in violation of the express terms of the separate Resolutions and TKPOA's MOU with CTRPA. The trial court, by denying the Application for Preliminary Injunction, has empowered LAHONTAN and the RESOURCES AGENCY to:

(1) violate TKPOA members, constitutional rights to due process and equal protection under the state and federal constitutions.

(2) violate their own authority as set forth in the LAHONTAN Resolution and the CTRPA Resolution;

(3) violate the Resolutions of one another;

(4) impair TKPOA's contract with CTRPA; and

TKPOA respectfully requests that the appellate opinion be reversed, and the appellate court ordered to vacate the trial court order and enter a new order granting the Preliminary Injunction, pending trial.

III

PROCEDURE

1. THE DENIAL OF A PRELIMINARY INJUNCTION IS APPEALABLE (RULE 13)

Code of Civil Procedure, §904.1(f), provides an appeal may be taken: "From an order granting or dissolving an injunction, or refusing to grant or dissolve an injunction." The Superior Court denied TKPOA's Request for Preliminary Injunction. (CT, p. 530.) Thus, the Order is an appealable Order.

2. THE PETITION FOR REVIEW IS PROPER

A Petition for Review shall be filed within ten days after the Court of Appeals decision becomes final as to that court. (Rule 28(b), Cal. Rules of Court.) A Court of Appeals decision becomes final 30 days after filing. (Rule 24, Cal. Rules of Court.) The opinion at issue, attached hereto as Exhibit A, was filed on March 30, 1994. Thus, this Petition for Review is timely.

IV

MEMORANDUM OF POINTS AND AUTHORITIES

1. THE VIOLATION OF TKPOA'S CONSTITUTIONAL RIGHTS CONSTITUTES IRREPARABLE HARM

A. Exaction Of The Mitigation Fee Is Constitutionally Impermissible

(1) Under The *Nollan* Test, The Collection of the Mitigation Fee Is Unconstitutional

Nollan v. Calif. Coastal Comm. (1987) 43 U.S. 85 [107 S.Ct. 3141, 97 L.Ed.2d 277] is dispositive. The *Nollan* Court held that a condition imposed precedent to development must be "reasonably related" to the consequence of the proposed development. (*Id.*, p. 834.) The Coastal Commission required the Nollans to grant a lateral public easement, ostensibly to further the public interest in providing public access to the beach, as a condition of granting the Nollans the right to replace their beachfront bungalow with a new three-bedroom home. (*Id.*, p. 828.) The Court conceded that public access to the beach is

indeed a legitimate public interest, but nonetheless declared the required exaction from the Nollans "utterly fails" to respond to the consequence of the proposed new development. (*Id.*, p. 837.) The Court concluded a sufficient nexus between the imposed condition and consequence of the proposed development had not been established. (*Id.*, pp. 839, 840.) The Court held the Commission abused its discretion by conditioning approval of the new development on the grant of a lateral access easement. (*Id.*, p. 841.)

The Commission argued that the permit condition was justified under its police power. (*Id.*, p. 836.) The Court agreed the condition would not constitute a taking under the Fifth Amendment as an exercise of police power *if* the requisite nexus was established. (*Id.*) Since the nexus between public access and construction of a larger residence was, at best, attenuated, the Court found the permit condition unjustified based on the Commission's police power, thus requiring the Commission to either pay for an easement under the Fifth Amendment or eliminate the condition. (*Id.*, p. 837.)

In other words, if the condition is reasonably related to the consequence of the development, the public agency's police power may be invoked to impose the condition without invocation of the taking clause of the Fifth Amendment. If the condition is remote, is not reasonably related, with no apparent cause and effect, a taking occurs, compelling compensation. (*Id.*, pp. 841-842.)

A taking occurs here because the Resolutions disclose that new development **mitigates its own impacts** and the

Mitigation Fee is designed to mitigate the impacts resulting from **pre-1972 development, without the required nexus.** (CT, at pp. 19-21, 30-34.) The "type of condition imposed" therefore does not mitigate the "type of impact caused by the development", nor is the condition "reasonable and fair relative to the burden created" by the construction of a new single-family residence. (*See Nollan, supra,* p. 837.) The $4,000 per lot Mitigation Fee is simply a special tax imposed without voter approval and is, therefore, an unconstitutional taking. (*Id.*)

In *Surfside Colony, Ltd. v. Calif. Coastal Comm.* (1991) 226 Cal.App.3d, 1260, 277 Cal.Rptr. 371 (modified, reh'g denied, Off. Rept. Cum. Sub. Hist. Table, Adv. Pamp. No. 10 [Feb. 14, 1991]), the nexus requirement as set forth in *Nollan* again compelled the reversal of the Commission's attempt to impose a "condition of approval" due to the absence of the requisite nexus. (*Id.*, p. 1263 [277 Cal.Rptr., p. 373].) Surfside Colony applied for an emergency permit to initiate erosion control measures. (*Id.*, pp. 1264-1265 [277 Cal.Rptr., p. 373-374].) The Commission granted the permit upon the condition that Surfside Colony grant public beach access to its gated beach. (*Id.*, p. 1265 [277 Cal.Rptr., p. 374].) The Court, following *Nollan,* concluded the Commission lacked "substantial evidence" upon which to impose its condition of approval, since there was no nexus between the erosion control project and public beach access. (*Id.*) In reviewing the rule enunciated in *Nollan,* the *Surfside* Court observed:

> "The Court has thus concluded requiring relinquishment of the owner's right to exclude others from their private beach *as a condition of*

> *the proposed construction amounted to virtual extortion.* (*See* 483 U.S. at p. 837, 107 S.Ct. at p. 3148.)
>
> * * *
>
> *"Nollan* requires a *'close connection' between the burden and the condition."*

(226 Cal.App.3d, at 1286 [277 Cal.Rptr., p. 376], emphasis added.)

The close connection test has not been met here. The burden is the claimed lost treatment capacity of the Truckee Marsh as a result of the original pre-1972 dragline and fill by the developer. (Both CTRPA and LAHONTAN Resolutions expressly state this. *See* CT, pp. 19-21, 30-34.) The condition is the payment from post-1982 TKPOA members constructing new homes of a Mitigation Fee to offset the pre-1972 burden (approximately 800 owners were previously permitted to build without payment of the Mitigation Fee, *see* CT, at p. 4.) Insofar as both Resolutions require, as a condition of approval, new development proposals to contain construction measures designed to offset the actual impacts resulting from the new development, the "close connection" requirement has been satisfied, and TKPOA concedes a nexus has been established between the "burden and the condition". Such is not the case here. Insofar as the Resolutions require TKPOA's **post-1982** builders of single-family residences to pay for **pre-1972** impacts, TKPOA contends the condition "utterly fails" to establish a "close connection" "between the burden and the condition". (*Nollan, supra,* p. 387; *Logtin's California Land Use 2d,* §822, pp. 201-215.)

Distillation of the *Nollan* and *Surfside* nexus analysis may be phrased rhetorically: "Is the condition fair?"

TKPOA contends it is inherently unfair to isolate and tax only those owners that were not financially able or fortuitous enough to have constructed their homes prior to 1982 to bear the entire burden for pre-1972 activities in which they did not participate. TKPOA respectfully submits neither the United States Constitution, nor the State Constitution permit a governmental entity to isolate a minority of owners within a development to pay for the claimed sins of the original developer, sins distant in time and unrelated to the actual environmental consequence of their individual development projects.

The Court of Appeals decision states:

> "However, contrary to TKPOA's assertion, it is **not necessary** that the governmental interest relate solely to the land or project in question, nor is it necessary that the regulation be limited to remedying the specific contribution to the problem that will be attributable to the project in question. (*See Associated Home Builders etc., Inc. v. City of Walnut Creek* (1971) 4 Cal.3d 633, 638; *Ayers v. City Council of Los Angeles* (1949) 34 Cal.2d 31, 41.) Rather, it is established that the justification for a restriction is not limited to the needs or burdens created only by the proposed project. (*Remmenga v. California Coastal Com.* (1985) 163 Cal.App.3d 623, 628.) The decision in *Nollan* did not cast doubt on this latter point. It specifically stated that the state could consider the effect of the project 'alone, or by reason of the cumulative impact produced in conjunction with othe [sic] construction.'. . . . The vice in *Nollan* was that the condition imposed utterly failed to further the end advanced as justification and not that it was not confined to the specific effects of the project in question."

(Opinion, at pp. 26-27.)

Unfortunately, the Court's Opinion relies entirely on pre-*Nollan* decisions which are no longer valid under *Nollan,* ignoring the nexus test. The issue of how tight that nexus must be is now before the U.S. Supreme Court in *Dolan, supra.* The U.S. Supreme Court is determining whether the nexus is required to be **solely** related to the new development or whether other public factors may be considered, as the Court of Appeals has done in its decision. If the *Dolan* decision determines that a ***specifically and uniquely attributable*** nexus is required to "protect the constitutional right to receive just compensation for a governmental taking of private property", then the Court of Appeals' decision is in clear error.

The Court of Appeals decision holds that TKPOA's members shall pay an exaction to offset impacts they did not create, freeing the state agencies to expend funds collected in the absence of the constitutionally required nexus pending trial. Thus, good cause exists to grant the Petition for Review.

(2) Respondent LAHONTAN's Acts Violate TKPOA's Constitutional Right to Equal Protection

The Court of Appeals also rejected TKPOA's claim the state agencies have denied TKPOA equal protection. The right to equal protection under the law is set forth in the Fourteenth Amendment of the U.S. Constitution: "No State shall make or enforce any law . . . nor deny to any person within its jurisdiction the equal protection of the

laws." Article I, Section 7, of the California State Constitution provides: "[A] person may not be . . . denied equal protection of the laws. . . . "

The equal protection test for takings is set forth in *Nollan*:

> "If the Appellant were being singled out to bear the burden of California's attempt to remedy these problems, **although they had not contributed to it more than other coastal landowners,** the State's action, even if otherwise valid, might violate either the incorporated Takings Clause or the Equal Protection Clause."

(*Nollan, supra,* p. 835, fn 4, emphasis added.)

In interpreting the foregoing, the Ninth Circuit found that "the action might violate the equal protection clause if the property owner were singled out to bear the burden of remedying the problems California sought to correct." (*Del Monte Dunes v. City of Monterey* (9th Cir. 1990) 920 F.2d 1496, 1509.) This is exactly what the Court of Appeals did herein. Only TKPOA's post-1982 homebuilders have been arbitrarily singled out to pay "the problems California sought to correct." (*Id.*)

Whenever a state official's acts are "malicious, irrational or plainly arbitrary," a claim exists for violation of substantive due process and equal protection. (*Lockary v. Kayfetz* (9th Cir. 1990) 917 F.2d 1150, 1155.) A regulation that bars construction on a persons' real property is unconstitutional. (*Lucas v. So. Carolina Coastal Commission, supra.*) TKPOA submits no rational reason exists to prohibit construction by post-1982 TKPOA members, unless they pay a $4,000 Mitigation Fee; these property owners

are "singled out to bear the burden of remedying the problems" the State seeks to correct, problems occurring as a result of the activities of others, distant in time and distant in effect. (*Del Monte Dunes v. City of Monterey, supra.*) **They are the only private property owners in the Tahoe Basin required to pay this fee.** (CT, p. 501.)

Respondents attempt to remedy the alleged loss of a SEZ by imposing a Mitigation Fee against only a subclass of TKPOA's members, members who had nothing to do with the alleged environmental loss. It is therefore evident the two Resolutions violate TKPOA's members' right to equal protection for the following reasons:

(1) Approximately 1150 TKPOA members were allowed to build without paying the Mitigation Fee. It was only after 1982 that Tahoe Keys' designation was changed to an unbuildable SEZ, even though the subdivision had already been improved. (CT, pp. 3-4.) Thus, approximately 650 of TKPOA's members were denied the right to build a residence unless they paid the Mitigation Fee, although the majority were permitted to build without the imposition of a Mitigation Fee.

(2) Both the CTRPA and the LAHONTAN Resolutions state the $4,000 Mitigation Fee is to mitigate the environmental damage allegedly caused by the original developer of the Tahoe Keys subdivision (pre-1972), not to mitigate the impacts of construction by TKPOA's members post-1982. (CT, pp.19-21, 30-34.) Even if Respondents have the legitimate goal to preserve water quality lost by development, a goal emphasized by the Court of Appeals, the imposition of a Mitigation Fee on TKPOA members who did **not** develop the subdivision unfairly

singles them out to bear the economic burden to remediate conditions they did not create.

(3) Not only are TKPOA members singled out from other TKPOA members who constructed prior to enactment of the two resolutions, they are also singled out from all other developments in the Tahoe Basin. LAHONTAN's Executive Officer testified that the Mitigation Fee at issue here was not assessed against any other subdivision within LAHONTAN's jurisdiction. (CT, p. 501.)

The within facts are strikingly similar to the *Nollan* Court's analysis of improper regulation:

> "The evident constitutional propriety disappears, however, if the condition substituted for the prohibition utterly fails to further the end advanced as the justification for the prohibition. When that essential nexus is eliminated, the situation becomes the same as if California forbade shouting fire in a crowded theater, but granted dispensation to those willing to contribute $100 to the state treasury . . . [E]ven though, in a sense, requiring a $100 tax contribution in order to shout fire is a lesser restriction on speech than an outright ban, it would not pass constitutional muster. . . . In short, unless the permit condition serves the same governmental purpose as the development ban, the building restriction is not a valid regulation of land use but 'an out-and out plan of extortion.' "

(*Nollan, supra,* p. 689, cite omitted.)

Here, CTRPA and LAHONTAN prohibited construction on some of TKPOA's members' lots, but allowed construction if a Mitigation Fee was paid on others. Nevertheless, the permit condition (payment of the

Mitigation Fee) was not to mitigate the TKPOA member's actual construction impacts, but to mitigate the developer's acts of creating the development **prior to** the member's construction. (CTRPA Resolution, LAHONTAN Resolution.) The within permit condition does not "serve the same governmental purpose as the development ban" and, thus, is likewise "an out-and-out plan of extortion." (*Ibid.*)

(3) The LAHONTAN Resolution Impairs TKPOA's Contractual Rights under the CTRPA Resolution

Both the United States and the California Constitutions bar any state from enacting any law impairing contracts. (United States Constitution, Article 1, Section 10; California Constitution, Article I, Section 9.) A statute may be deemed contractual in nature. (*Cate v. Stapleton* (1941) 43 Cal.App.2d 492 [111 P.2d 437, 439].) Based on the mutual obligations and duties set forth therein, the Resolutions are implied contracts.

On May 7, 1982, CTRPA executed its Resolution requiring that TKPOA, CTRPA and LAHONTAN enter into an MOU that "will include payment of a Mitigation fee of $4,000. . . . " (CT, p. 21.)

Thereafter, on May 13, 1982, LAHONTAN passed its Resolution. (CT, pp. 30-34.) In its Resolution, LAHONTAN attempts to impair TKPOA's contractual rights under the CTRPA Resolution and the MOU. LAHONTAN attempts to designate how the same $4,000 Mitigation Fee previously designated in the CTRPA Resolution is to be collected and disbursed. (*Ibid.*) Not only does the

LAHONTAN Resolution expand expenditure of the Mitigation Fund from on-site mitigation projects to off-site mitigation projects, the Resolution eliminates TKPOA from the participatory process by excising the MOU called for in the CTRPA Resolution and agreed to by TKPOA and CTRPA. Manifestly, on its face, the LAHONTAN Resolution impairs TKPOA's contract.

Moreover, as applied, the LAHONTAN Resolution impairs TKPOA contractual rights under the CTRPA Resolution. LAHONTAN's Executive Officer, Harold Singer, testified that any projects proposed by TKPOA would be excluded from consideration. (CT, p. 492.) Mr. Singer explained that based on TKPOA's position that any expenditures from the Mitigation Fund violate TKPOA's constitutional rights, LAHONTAN **decided to completely exclude TKPOA** from the process and expend the Mitigation Fund on any project, but a TKPOA project. (*Ibid.*, emphasis added.) LAHONTAN's application of its Resolution is arbitrary, capricious, malicious, retaliatory and without any rational basis to any legitimate state purpose. A statute valid on its face may be enjoined if unconstitutionally applied. (*Brock v. Superior Court* (1939) 12 Cal.2d 605, 610 [86 P.2d 805].) LAHONTAN's acts mandate injunctive relief pending trial.

B. TKPOA Is Entitled to a Preliminary Injunction for Violation of Its Constitutional Rights

Respondents are violating the Fifth and Fourteenth Amendments of the United States Constitution and Article I, Section 7, of the California Constitution by collecting and expending the Mitigation Fees in the absence of

the required nexus. (*Nollan, supra; Surfside, supra.*) Violation of a constitutional right is irreparable harm that cannot be remedied by an action at law. (*See Conover v. Hall* (1974) 11 Cal.3d 842, 850 [114 Cal.Rptr. 642]; *Brock v. Superior Court* (1939) 12 Cal.2d 605, 610 [86 P.2d 805]. "[I]t is a legal common place that injunctive relief is available when constitutional rights are being violated, regardless of a damages remedy at law. . . . The very purpose of the preliminary injunction is to prevent the irreparable loss of rights before judgment." (*Nat. Org. for Reform of Marijuana Laws v. Mullen* (D.C. Cal. 1985) 608 F.Supp. 945, 962, remanded on other issue, (9th Cir. 1986) 796 F.2d 276; accord 11 Wright & Miller, *Federal Practice and Procedure* (1973) §2948, p. 440, (updated 1991), "When an alleged deprivation of constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary."; *Citicorp Services, Inc. v. Gillespie* (N.D. Cal. 1989) 712 F.Supp. 749, 753, "courts in the Ninth Circuit have presumed irreparable harm from an alleged violation of constitutional rights.") Nevertheless, the Court of Appeals decision states:

> "In asserting the right to provisional relief TKPOA argued, essentially, that the fee is unconstitutional and if defendants are permitted to collect it pending trial then individual lot owners will be compelled to suffer, at least temporarily, the payment of an unconstitutional fee. To the extent this assertion involves the likelihood that TKPOA will prevail on the merits we will discuss it in a subsequent portion of this opinion. At this point, **we will not presume irremediable injury or the inadequacy of legal remedies based simply on assertion of a constitutional theory for relief.**" (Opinion, at p. 13.)

This finding is not cited to any authority and is in direct conflict with this Court's decisions as well as federal law. (*Conover, Brock, Mullen,* and *Citicorp., supra.*)

Moreover, the Court is required to exercise its discretion "in favor of the party most likely to be injured. . . . If the denial of an injunction would result in great harm to the plaintiff, and the defendants would suffer little harm if it were granted, then it is an abuse of discretion to fail to grant the preliminary injunction." (*Robbins v. Super. Ct. (County of Sacramento)* (1985) 38 Cal.3d 199, 206 [211 Cal.Rptr. 398, 401].)

On July 9, 1991, TKPOA filed the Declaration of one of its members indicating the member cannot build his residence unless he pays the $4,000 Mitigation Fee to LAHONTAN. (CT, pp. 309 *et seq.*) The verified First Amended Complaint reveals that TKPOA's members have paid approximately $1.5 million to LAHONTAN under Resolutions TKPOA submits are unconstitutional. (CT, pp. 44 *et seq.*) TKPOA is not asking for the Mitigation Fund to be returned pending litigation, only that the Fund remain intact until the Court determines whether it has been lawfully collected and that no additional Mitigation Fees be collected from its members pending trial.

Respondents will suffer no harm by the issuance of injunctive relief. They have not used the funds in nine years. After TKPOA filed its Complaint requesting Declaratory Relief, Respondents commenced plans to immediately spend the money. Why the apparent hurry to spend the money before the Court can determine the constitutionality of collection and expenditure? Balancing

of the equities clearly tips the scale in favor of the issuance of a preliminary injunction.

C. TKPOA Has a Reasonable Probability of Prevailing on Its Constitutional Claim

Both the LAHONTAN and the CTRPA Resolutions shift the economic burden for claimed pre-1972 environmental detriment to post-1982 single-family construction within Tahoe Keys.[3] The constitutional violations by Respondents are ongoing. (*See* First Amended Complaint, Exhibit F, CT, pp. 87-88, LAHONTAN Resolution 6-91-47, denying TKPOA's request that the funds be returned and collection terminated, and Declaration of Gregory A. Bennallack, CT, pp. 309 et seq.) Declaratory relief based on on-going violations are not barred by the statute of limitations. (*Maguire v. Hibernia Savings & Loan Soc.* (1944) 23 Cal.2d 719, 733 [146 P.2d 673].)

A fee exaction as a condition of a building permit "will not constitute a taking if it is made for the purpose of paying a social cost that is reasonably related to the activity against which the fee is assessed." (*Commercial Builders v. Sacramento* (9th Cir. 1991) 941 F.2d 872, 876.)

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[3] LAHONTAN claims the original dragline and fill created nutrient rich (nitrogen and phosphorus) waterways, promoting algae growth. TKPOA's data conflicts with LAHONTAN's. TKPOA submitted data at the May 5, 1991, LAHONTAN Regional Board Meeting indicating its waterways contains lower levels of nutrients than Lake Tahoe. In any event, post-1981 builders do not contribute to the claimed problem and, therefore, should not be forced to finance mitigation that is not related to their activities.

The building permit condition to pay the Mitigation Fee is to pay for the social costs of the original development, not the social cost of the TKPOA member's construction. No reasonable relationship exists. According to both Resolutions, the future construction is completely and separately mitigated in full. (CTRPA Resolution (CT, pp. 19-21), LAHONTAN Resolution (CT, pp. 30-34).) Thus, a regulatory taking has occurred, both facially and as applied. (*Nollan, supra.*)

2. TKPOA IS ENTITLED TO INJUNCTIVE RELIEF BASED ON STATUTORY CLAIMS

A. INTRODUCTION

The $4,000 Mitigation Fee referred to in the CTRPA Resolution is the same $4,000 Mitigation Fee referred to in the LAHONTAN Resolution. (CT, at p. 500.) The conflicting Resolutions differ, *inter alia*, as follows:

> (1) *MOU*: CTRPA requires an MOU between TKPOA, CTRPA and LAHONTAN prior to any fund expenditure, while LAHONTAN's does not.
>
> (2) *Expenditures*: CTRPA gives priority to on-site [Tahoe Keys] mitigation projects, while LAHONTAN's does not.

(CT, pp. 19-21, 30-34.)

Even though the LAHONTAN Resolution contains a condition precedent to expenditure from the Mitigation Fund, *i.e.*, submission of a "management and mitigation plan . . . approved by the Regional Board," LAHONTAN

disregards both the CTRPA Resolution and its own Resolution in proceeding to expend Mitigation Funds without giving priority to Tahoe Keys' on-site mitigation, without executing an MOU, in violation of TKPOA's MOU with CTRPA, and without deferring expenditure until TKPOA submits a "management and mitigation plan . . . approved by the Regional Board." (*Ibid*) Both Resolutions require that CTRPA and LAHONTAN work with TKPOA to determine how the funds collected from TKPOA members will be spent. (*Ibid.*) **TKPOA members are the only building permittees within the Tahoe Basin required to pay an extra fee in order to build.** (CT, p. 501.)

B. STATUTORY AUTHORITY FOR INJUNCTIVE RELIEF

A preliminary injunction may be granted where any one or more of the statutory grounds exist. (C.C.P. §525.) Moreover, an injunction may be granted when it appears by the complaint that plaintiff is entitled to the relief demanded, including the restraining of the commission or continuance of the act complained of during the pendency of the action. (C.C.P. §526(1).) If the commission or continuance of some act during the litigation would produce great or irreparable injury to plaintiff, an injunction may be granted. (C.C.P. §526(2).) TKPOA's members have been burdened by the Resolutions, and respectfully submit that the agencies should, at the very least, abide by the requirements of the governing Resolutions before invasion of the Mitigation Fund.

The Mitigation Fund is in imminent danger of dissipation by LAHONTAN, contrary to the requirements of

Resolution 82-8 and in conflict with Resolution 82-10. (CT, pp. 193-496.) Further, TKPOA's members must pay the Mitigation Fee, over TKPOA's constitutional and statutory objection to such payment, in order to perfect a building permit. (CT, pp. 309 *et seq.*) Otherwise, TKPOA's members are barred from any construction on their property. (*See Lucas, supra.*)

The question is not whether money damages will remedy the injury to TKPOA pending trial: the question is whether TKPOA must endure a State Agency violating its own resolution, violating another State Agency's resolution, and violating TKPOA's members' constitutional rights prior to a trial on the merits. It is axiomatic that such conduct by the State is enjoinable. (C.C.P. §§526(1) and 526(2).) TKPOA has no plain, speedy or adequate remedy at law. Without an injunction, Respondents will continue to prevent TKPOA members from constructing their homes unless they pay the $4,000 Mitigation Fee, and Respondents threaten to dissipate the Mitigation Fund prior to trial. (CT, pp. 481 *et seq.*, including quotations from Singer Deposition.)

C. RESPONDENTS' STATUTORY VIOLATIONS

After TKPOA requested the trial court to declare the rights of the parties, Respondents immediately initiated plans to spend the Mitigation Fund prior to trial. (Singer Deposition, CT, pp. 493-496.)

This Honorable Court may make its own determination of the issues in determining whether or not to vacate the Order denying the Application for Preliminary

Injunction and Ordering the Trial Court to enter its Order granting the same.

> "When the facts do not conflict and the issues involve proper application of a statute or administrative regulation, a reviewing court is not bound by the trial court's determination."

(Alba v. L.A. Un. Sch. Dist. (1983) 140 Cal.App.3d 997 [189 Cal.Rptr. 897, 902].)

TKPOA respectfully submits Respondents must be enjoined from violating their own resolutions, the resolutions of other state agencies, and from violating TKPOA's members' constitutional rights.

(1) CTRPA'S Successor Should Be Enjoined from Violating CTRPA Resolution 82-10

CTRPA Resolution 82-10 provides that the $4,000 Mitigation Fee is to be collected pursuant to an MOU executed by CTRPA, LAHONTAN and TKPOA. (CT, p. 20.) The required MOU was never executed by all three parties; however, it is noteworthy Petitioner and CTRPA executed the MOU. (CT, at p. 512.) Thus, pursuant to the CTRPA Resolution, a condition precedent to collection and expenditure of the Mitigation Fee and Mitigation Fund has not been met. "When a debtor entitled to the performance of a condition precedent to, or concurrent with, performance on his part, he may make his offer [to perform] to depend upon the due performance of such condition." (Civil Code §1498.) Consequently, the

RESOURCES AGENCY should be enjoined from collection of the Mitigation Fee and expenditure of the Mitigation Fund for failure to obtain LAHONTAN's execution of the MOU as required by Resolution 82-10.

Additional requirements for expenditure of the Mitigation Fund set forth in CTRPA Resolution 82-10 have not been met. The funds were to be expended on a specific mitigation program developed by TKPOA, LAHONTAN and CTRPA, with *priority* given to on-site mitigation measures. (CT, p. 21.) Nevertheless, CTRPA and LAHONTAN, to the exclusion of TKPOA, threaten to fund projects to the actual exclusion of on-site projects at Tahoe Keys. (Singer Deposition, CT, pp. 493-496.) **At the very least, the Resolution is reciprocal: so long as TKPOA's members fund the Mitigation Fund, TKPOA's members are entitled to their participatory right in determining its disposition.** (*See* C.C. §1498.) "In the construction of a statute the intention of the legislature, and in the construction of an instrument the intention of the parties, is to be pursued, if possible. . . . " (C.C.P. §1859.)

(2) LAHONTAN Should Be Enjoined from Violating Its Own Resolution

LAHONTAN's Resolution 82-8 is in obvious response to CTRPA's Resolution 82-10 and the MOU. (CT, pp. 30-34.) LAHONTAN did not agree with some of the CTRPA provisions and so adopted its own Resolution concerning the very same Mitigation Fee, simply omitting what it did not like and adding its own wish list. (*Ibid.*)

TKPOA's members are the victims of this regulatory turf war.

In 1988, six years after the Mitigation Fund was established, LAHONTAN staff prepared a report concerning the potential disposition of the unexpended Mitigation Fund. (CT, pp. 509 *et seq.*) LAHONTAN inquired of its counsel as follows:

> "(2) Who may propose, and who must approve, projects to be funded through the Tahoe Keys Mitigation Fund? If this is not defined, what agreements need to be made to define this approval process?"

(CT, p. 513.)

Counsel advised that LAHONTAN should enter into an MOU with TKPOA before making expenditures from the Mitigation Fund. Its counsel opined:

> "Question #2: *The Regional Board should sign and execute a MOU with the TKPOA outlining the procedures and criteria for spending money from the mitigation fund.* This MOU should be consistent with Resolution 82-8 in that the mitigation fund must be administered by a public entity or entities approved by the Executive Officer and that the use of the fund also requires the approval of the Executive Officer. . . . "

(CT, p. 513, emphasis added.)

TKPOA agrees with LAHONTAN's counsel. (*Ibid.*) The Resolution specifically provides for collection (not expenditure) of the Mitigation Fund *"until a management and mitigation plan is submitted by the TKPOA and approved by the Regional Board. . . . "* (CT, p. 33, emphasis added.)

TKPOA welcomed an MOU with LAHONTAN as evidenced by its execution of the CTRPA MOU. (CT, p. 512.) As indicated above, this condition precedent has not occurred.

(3) Collection and Expenditure Should Be Enjoined Based on Conflicts between the Resolutions

Assuming, *arguendo,* that the Mitigation Fee collected and proposed to be expended is constitutional under either the LAHONTAN Resolution or the CTRPA Resolution (which Appellant does not concede), Respondents should nevertheless be enjoined from continuing to collect the Mitigation Fee or expend the Mitigation Fund based on the actual conflict between the two Resolutions.

If LAHONTAN spends the funds according to its Resolution, it will violate the CTRPA Resolution which provides that priority be given to on-site projects within Tahoe Keys. (CT, p. 21.) If the RESOURCES AGENCY spends the funds, it will violate its predecessor's Resolution which provides all expenditures shall be according to an MOU executed by LAHONTAN and TKPOA. (*Ibid.*) Moreover, LAHONTAN's expenditure in advance of the receipt and approval of a mitigation plan submitted by TKPOA will violate the express terms of its Resolution (as well as the advice of its counsel!). (CT, pp. 32, 513.) It is evident TKPOA will suffer great and irreparable harm by Respondents' actions in violation of their own (conflicting) Resolutions. (*See* C.C.P. §526(2).)

(4) Respondents Are Acting Contrary to Public Policy

The Court of Appeals held that Petitioner was not entitled to injunctive relief, apparently based on the theory that TKPOA can recover damages, or obtain a legal remedy, for Respondents' acts if TKPOA prevails at trial. This is a matter of first impression for this Court concerning whether irreparable injury includes a state agency violating its own regulations or violating a constitutional right with impunity so long as a party may thereafter pursue damages. The public's right to rely upon government complying with its own rule of law and in compliance with the U.S. and California constitutions is the appropriate standard.

TKPOA submits that public policy should not condone state agencies violating their own regulations pending a trial while a party is requesting the court to declare the parties' rights under obviously conflicting legislation. (*See* Government Code §11350, which provides any interested person may seek declaratory relief as to the validity of any regulation by bringing a declaratory relief action under the Code of Civil Procedure.) To hold otherwise sends a message to government agencies that they may violate their own regulations or regulations of other administrative agencies so long as they are willing to pay for it. Certainly, the people of this State expect state agencies to comply with their own rules, the rules of other state agencies, and the constitution. If the government exceeds its authority, aggrieved citizens should be able to obtain judicial relief before the threatened harm is perfected, however the Court of Appeals' decision notes

this is not grounds for injunctive relief. (Court of Appeals Decision, at p. 40.)

CONCLUSION

Based on the foregoing points and authorities, TKPOA respectfully requests this Honorable Court grant TKPOA's Petition for Review. If review is not granted, the Court of Appeals decision shall be published and allow governmental agencies authority to ignore the *Nollan* decision as to regulatory takings cases, a matter of great public concern, subjecting TKPOA's members to immediate and irreparable harm.

DATED: May 4, 1994.

FELDMAN, SHAW DeVORE
A Law Corporation

By: /s/ Lewis S. Feldman
Lewis S. Feldman
Deborah A. Palmer
Attorneys for Plaintiff and Petitioner TKPOA

[Exhibit A Omitted In Printing]

APPENDIX E

CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD LAHONTAN REGION

RESOLUTION NO. 82-8

Reclassification of Land Capability for Tahoe Keys Development

WHEREAS, the California Regional Water Quality Control Board, Lahontan Region, finds:

1. The Tahoe Keys is a land development located adjacent to Lake Tahoe within the City of South Lake Tahoe, California as shown on Attachment "A"; and

2. Portions of Tahoe Keys development under the jurisdiction of the Tahoe Keys Property Owners Association (TKPOA), as shown on Attachment "A" have been created by extensive dredging and filling of the Upper Truckee marsh; and

3. A portion of the Tahoe Keys development has been dredged and filled but has not been subdivided; and

4. A portion of the Tahoe Keys development known as Mt. Tallac Village Unit No. 3 has not been substantially dredged, filled or modified but has been subdivided; and

5. The area which was modified to create the Tahoe Keys development now under the jurisdiction of the TKPOA was originally a stream environment zone with the following characteristics:

   - it included streams, small lakes and ponds
   - it was a wetland and an area of riparian vegetation

- it was an area with alluvial soils
- it was included within the 100-year flood plain of the Truckee River and other streams; and

6. In its current altered state, the land within the Tahoe Keys development now under the jurisdiction of the TKPOA does not exhibit the characteristics of a stream environment zone for the following reasons:
   - the fill soils are generally different from alluvial soils characteristic of stream environment zones
   - the area generally does not contain native riparian vegetation
   - the area is not generally influenced by stream flows, high groundwater or poor drainage associated with wetlands
   - the filled areas are generally above the 100-year flood plain of the Truckee River and other streams; and
7. The State Water Resources Control Board, acting pursuant to California State law, has adopted a Water Quality Control Plan for the Lake Tahoe Basin, which prohibits development in any stream environment zone except:
   - to control existing sources of erosion or water pollution
   - to carry out the Lake Tahoe Basin Non-Attainment Plan adopted by the California Air Resources Board
   - for health, safety or public recreation; and
8. The Water Quality Control Plan for the Lake Tahoe Basin specifies that reclassification of man-modified stream environment zones would not be appropriate where further development would exacerbate the

water quality problems created by the alteration of the stream environment zone, where the restoration of the stream environment zone has not been considered, or where mitigation measures to make up for at least a part of the loss of natural treatment capacity caused by the alteration of the stream environment zone have not been considered; and

9. The Lahontan Regional Water Quality Control Board has been assigned authority and responsibility for matters of water quality within the Lake Tahoe Basin by the Porter-Cologne Water Quality Act and, as such, is the agency which must make these determinations; and

10. The modifications of the stream environment zone which resulted in the Tahoe Keys development now under the jurisdiction of the TKPOA was accomplished prior to June 11, 1972 the date of adoption of the Interim Water Quality Control Plan for the North Lahontan Basin, which included prohibitions on filling below the high water rim of Lake Tahoe; and

11. The Tahoe Regional Planning Agency has approved an administrative permit authorizing for the Tahoe Keys development, with the exception of Mt. Tallac Village Unit No. 3, a 30% impervious surface, as appropriate for land capability class 6; and

12. The California Tahoe Regional Planning Agency has designated the Tahoe Keys development a substantially altered stream environment zone and substantially altered class lb land, and have allowed development to a maximum coverage of 30% on these lands; and

13. Further development on subdivided land within the Tahoe Keys development under the jurisdiction of the TKPOA, if suitably mitigated, will not exacerbate

water quality problems created by alteration of the stream environment zone; and

14. It is unfeasible to restore the Tahoe Keys development under the jurisdiction of the TKPOA to its original condition as a stream environment zone and wetland; and

15. Stream environment zones in their undisturbed state provide substantial natural treatment reducing sediment and nutrient loadings to Lake Tahoe; and

16. Significant reduction of the natural treatment capacity of the original stream environment zone has occurred by the modification of the upper Truckee marsh, and substantial water quality deterioration to Lake Tahoe has thus occurred; and

17. Partial mitigation of the natural treatment capacity, lost by the modification of the Truckee marsh, can be accomplished by various onsite and offsite mitigation measures or offsets within the Tahoe Keys development or at other locations within the Lake Tahoe Basin; and

18. The construction and continuing operation and maintenance of the now existing Tahoe Keys development of lagoons and peninsulas contributes significant quantities of nutrients to the waters of Lake Tahoe; and

19. A mitigation fee of $4000 per vacant lot to be developed within the TKPOA portion of the Tahoe Keys development has been determined by the Regional Board staff, in accordance to the procedure set forth in attachment "B", to be sufficient to insure adequate implementation of the mitigation measures required for the TKPOA portion of the Tahoe Keys development by the Water Quality Control Plan for the Lake Tahoe Basin; and

20. The California Tahoe Regional Planning Agency has prepared a negative declaration of environmental impact for the buildout of the Tahoe Keys development in accordance with the California Environmental Quality Act (Public Resources Code Section 21000 et seq.) and the State Guidelines; and

21. No substantial adverse changes in environment as a result of this action have been identified in the negative declaration.

NOW THEREFORE BE IT RESOLVED:

1. That Regional Board Resolution 81-2 is hereby rescinded and replaced with this Resolution; and

2. That the Tahoe Keys Property Owners Association submit to the Regional Board a management and mitigation plan describing mitigation measures which will be implemented for the life and buildout of the Tahoe Keys development under the jurisdiction of the TKPOA. This plan shall be formulated to achieve a level of mitigation which shall insure that all adverse effects of new construction are fully mitigated, that adverse effects of the existing development and maintenance operations are fully mitigated, and that a significant portion of the natural treatment capacity lost by conversion of the original stream environment zone be restored or mitigated onsite or offsite; and

3. That all adverse effects of new construction, occuring after the effective date of this Resolution, within the Tahoe Keys development under the jurisdiction of the TKPOA be fully mitigated; and

4. That all adverse water quality effects created by ongoing activities, operations and maintenance of the Tahoe Keys development be fully mitigated so as

not to create any adverse impacts upon the water quality of Lake Tahoe; and

5. That a significant portion of the natural treatment capacity lost by conversion of the original stream environment zone be restored, or mitigated onsite or at another location within the Lake Tahoe Basin; and

6. That development on lots within the Tahoe Keys development for which a valid 1982 building permit is received as part of the random selection process be permitted; and

7. That provided compliance with local ordinances is achieved, transfer of building permits from lots from elsewhere in the El Dorado County portion of the Lake Tahoe Basin, including the City of South Lake Tahoe, to lots within the Tahoe Keys development be permitted; and

8. That the Tahoe Keys development under the jurisdiction of the TKPOA (apart from Mt. Tallac Village Unit No. 3) be designated a man-modified stream environment zone and not be subject to the stream environment zone waste discharge prohibitions listed within the Water Quality Control Plan for the Lake Tahoe Basin; and

9. That the Tahoe Keys development under the jurisdiction of the TKPOA (apart from Mt. Tallac Village Unit No. 3) be designated man-modified stream environment zone and not subject to the low capability land waste discharge prohibitions listed within the Water Quality Control Plan for the Lake Tahoe Basin; and

10. That until a management and mitigation plan is submitted by the TKPOA and approved by the Regional Board, mitigation shall consist of payment of a fee of $4000 for each lot which is developed.

Payment shall be made to a mitigation fund established to accomplish the construction of projects within the Lake Tahoe basin to achieve a net reduction of nutrients equivalent to that generated by the Tahoe Keys development. The fund must be administered by a public entity or entities approved by the Executive Officer. Furthermore, the use of mitigation funds for the implementation of specific projects shall require the approval of the Executive Officer. The Executive Officer is authorized to enter into such agreements as may be required to ensure the proper administration of the mitigation fund. Payment of such mitigation fee shall precede any development on each lot; and

11. That by the regular meeting of the Regional Board in March of each year, the Regional Board shall review progress of the management and mitigation plan and shall make a determination regarding the development which may be permitted during the following year.

I, Roy C. Hampson, Executive Officer, do hereby certify that the foregoing is a full, true and correct copy of a Resolution adopted by the California Regional Water Quality Control Board, Lahontan Region, on May 13, 1982.

[SEAL]

/s/ Roy C. Hampson
ROY C. HAMPSON
EXECUTIVE OFFICER

APPENDIX F

RESOLUTION 82 - 10

WHEREAS, the Tahoe Keys Property Owners' Association (TKPOA) has requested the CTRPA Governing Board grant their request to be designated a Substantially Altered Environment;

WHEREAS, the CTRPA Regional Plan contains a provision which allows the Governing Board to reclassify or create a special classification for areas determined to be substantially altered; and

WHEREAS, the Tahoe Keys is a land development located adjacent to Lake Tahoe within the City of South Lake Tahoe, California, and portions of this development have been created by extensive dredging and filling of the Upper Truckee Marsh; and

WHEREAS, a portion of the Tahoe Keys Development has been dredged and filled but has not been subdivided; and

WHEREAS, a portion of the Tahoe Keys Development known as Mt. Tallac Village Unit No. 3 has not been substantially dredged, filled or modified, but has been subdivided; and

WHEREAS, the Lahontan Regional Water Quality Control Board, as administrator of the State Water Quality Control Plan for Lake Tahoe, has required submittal of a comprehensive technical report in order to proceed with further development; and

WHEREAS, the Lahontan Regional Water Quality Control Board has adopted a resolution which resolves

that portions of the Tahoe Keys are man altered and that it is unfeasible to restore the Tahoe Keys to its original condition as a stream environment zone and wetland; and

WHEREAS, the CTRPA, in cooperation with the TKPOA and Lahontan Regional Water Quality Control Board, has completed a water quality and hydrology study of the Tahoe Keys Subdivision; and

WHEREAS, this study concludes that further development on subdivided land within the Tahoe Keys Development will not exacerbate water quality problems created by alteration of the stream environment zone provided appropriate mitigation is included with development proposals; and

WHEREAS, CTRPA finds that it is not feasible to restore the Tahoe Keys Development to its original condition as a stream environment zone and wetland; and

WHEREAS, stream environment zones, in their undisturbed state, provide substantial natural treatment reducing sediment and nutrient loadings to Lake Tahoe; and

WHEREAS, significant reduction of the natural treatment capacity of the original stream environment zone has occurred by the modification of the Upper Truckee Marsh, and substantial water quality deterioration to Lake Tahoe has thus occurred; and

WHEREAS, partial mitigation of the natural treatment capacity, lost by the modification of the Truckee Marsh, can be accomplished by various onsite and offsite mitigation measures or offsets within the Tahoe Keys

Development, or at other locations within the Lake Tahoe Basin; and

WHEREAS, the construction and continuing operation and maintenance of the now existing Tahoe Keys Development of lagoons and peninsulas contributes significant quantities of nutrients to the water of Lake Tahoe; and

WHEREAS, the Final Environmental Impact Report on the CTRPA 1980 Plan, Regional Plan Update, addresses, in general, the impact of development to be allowed as a result of building in substantially altered stream environment zones; and

WHEREAS, the CTRPA has prepared and circulated a Negative Declaration of Environmental Impact for the proposed redesignation of the filled portions of the Tahoe Keys Development; and

WHEREAS, no substantial adverse environmental impacts have been identified in the Negative Declaration as a result of this action; and

WHEREAS, the CTRPA and Lahontan staffs have met with representatives of the TKPOA and have reviewed the findings, conclusions and recommendations of the Tahoe Keys Water Quality and Hydrology Study, completed by Agency consultants; and

WHEREAS, a Memorandum of Understanding has been prepared, setting forth the mitigation package as proposed by the TKPOA; and

WHEREAS, this Memorandum of Understanding is consistent with the conclusions of the Water Quality and Hydrology Study recently completed on the Tahoe Keys

Development, and complies with the "substantially altered environment" provisions of the CTRPA Regional Plan, 1980,

NOW, THEREFORE BE IT RESOLVED that CTRPA Resolutions 81-5 and 82-6 are hereby rescinded and replaced by this resolution;

FURTHER, that development on lots within the subdivided portions of the Tahoe Keys Development, except for Mt. Tallac Village Unit No. 3, for which valid building permits are received as part of the random selection process, be permitted;

FURTHER, that the Tahoe Keys have been substantially man-altered from the natural conditions existing prior to dredging in that they do not act to improve water quality as do natural stream environment zones, and, that based upon the proposed Memorandum of Understanding between CTRPA, TKPOA and the Lahontan Regional Water Quality Control Board, the Tahoe Keys Subdivision, except for Mt. Tallac Village Unit No. 3 is designated a substantially altered environment for purposes of the 1980 Regional Plan;

FURTHER, the mitigation plan to be implemented will ensure that all adverse effects of future development will be mitigated, that every effort will be made to mitigate the impacts of existing development, and that the adverse impacts resulting from the loss of natural capacity by conversion of the original stream environment zone will be mitigated, either on or offsite;

FURTHER, that the Memorandum of Understanding will include payment of a mitigation fee of $4,000 (including TRPA's $750 mitigation fee) for each lot on which development is proposed. The purpose of this fund is to accomplish projects which achieve a net reduction of nutrients equivalent to that generated by the Tahoe Keys Development. Priority shall be given to onsite mitigation measures. This fund shall be administered by CTRPA, through its Executive Officer, during the 1982 building season, and thereafter, by CTRPA's designated successor;

FURTHER, as provided in the Regional Plan, the Tahoe Keys Subdivision (apart from Mt. Tallac Village Unit No. 3) is not subject to the low capability land requirements of the Plan, November, 1980, for purposes of permit allocation;

FURTHER, that development proposals allowed pursuant to this resolution shall include submittal of individual plans in accordance with prescribed standards and procedures, and a detailed revegetation plan to the CTRPA staff for review and approval;

FURTHER, that the land coverage allowed shall not exceed 30% of the land area above the high water line. However, the TKPOA may submit a proposal which redistributes the allowed land coverage based on lot size;

FURTHER, provided compliance with local ordinances is achieved, transfers of permit allocations may be allowed from lots outside the Tahoe Keys Development, in addition to transfers from lots within Tahoe Keys. In the case of transfers from parcels in El Dorado County, the County shall retain 50% of the $750 TRPA mitigation fee;

FURTHER, staff is directed to work with the TKPOA and Lahontan on development of a specific mitigation program whereby it is set forth how the funds generated by this Resolution and the Memorandum Agreement of Understanding between CTRPA, TKPOA and Lahontan are to be spent.

PASSED AND ADOPTED by the Governing Board of the California Tahoe Regional Planning Agency on May 7, 1982, by the following vote:

Ayes: Mr. Poznanovich, Mrs. Lowe, Mr. Sevison,
Ms. McFarland, Mr. Benevento, Mr. Marx
Nayes: None
Absent: None
Abstain: Dr. Twiss

/s/ Robert Twiss
Robert H. Twiss, Chairman
/s/ Karin L. Shurson
Karin L. Shurson
Administrative Assistant

APPENDIX G

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

TAHOE KEYS PROPERTY OWNERS' ASSOCIATION, a non-profit mutual benefit corporation, Plaintiff and Appellant, v. **STATE WATER RESOURCES CONTROL BOARD; STATE OF CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD -- LAHONTAN REGION; STATE OF CALIFORNIA RESOURCES AGENCY, AND DOES 1 through 25 inclusive,** Defendants and Respondents.	3 Civil C012562

El Dorado County Superior Court No. SV91-0164
The Honorable J. Hillary Cook, Judge

RESPONDENTS' BRIEF

DANIEL E. LUNGREN
Attorney General of the State of California

RODERICK E. WALSTON
Chief Assistant Attorney General

JAN S. STEVENS
Assistant Attorney General

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Attorneys for Respondents

* * *

a burden that should be borne by the public as whole. (Citation.)" (*Yee v. City of Escondido* (1992) ___ U.S. ___, ___ [112 S.Ct. 1522, 1526, 118 L.Ed.2d 153].)

Our case does not fall within the first category of takings decisions, since the challenged resolutions do not concern a physical occupation of property. No easements or other property dedications are involved. To the contrary, the resolutions only call of the payment of a $4000 per lot water quality mitigation fee. Case law is clear that these fees are not physical takings under the fifth amendment. (See *Commercial Builders v. City of Sacramento* (9th Cir. 1991) 941 F.2d 872, 875, 876 (cert. den. ___ U.S. ___ [112 S.Ct. 1997, 118 L.Ed.2d 593]); *Blue Jeans Equities West v. City and County of San Francisco* (1992) 3 Cal.App.4th 164, 166.)

Rather, our case falls with the considerably less stringent regulation of use category. Instead of applying a "set

formula" in analyzing whether or not a taking has occurred in these cases, the courts rely "on ad hoc, factual inquires [sic] into the circumstances of each particular case." (*Connolly v. Pension Benefit Guaranty Corp.* (1986) 475 U.S. 211, 224 [106 S.Ct. 1018, 89 L.Ed.2d 166].) Nevertheless, in making this determination, the courts are guided by certain factors. Thus, the challenged fee will only be found unconstitutional if considerations such as its *purpose* or the extent to which it deprives lot owners of the *economic use* of their property suggest that owners have been unfairly singled out to bear a burden that should be met by the general public. (*Yee v. City of Escondido, supra,* ___ U.S. at ___ [112 S.Ct. at 1526].)

As will be seen, a review of the purpose of the mitigation fee, the nexus between the fee and that purpose, and the economic use remaining in lots after payment of the fee, show that it is most fair to have Tahoe Keys lot owners, rather than California taxpayers, pay for mitigating the pollution caused by the Tahoe Keys development.

* * *

APPENDIX H

FELDMAN, SHAW & DeVORE, A LAW CORPORATION
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Attorneys for Plaintiff and Petitioner
TAHOE KEYS PROPERTY OWNERS' ASSOCIATION

IN THE SUPERIOR COURT OF THE
STATE OF CALIFORNIA IN AND FOR THE
COUNTY OF EL DORADO

TAHOE KEYS PROPERTY OWNERS' ASSOCIATION, a non-profit mutual benefit corporation, Plaintiff and Petitioner, vs. STATE WATER RESOURCES CONTROL BOARD; STATE OF CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD – LAHONTAN REGION; STATE OF CALIFORNIA RESOURCES AGENCY, and DOES 1 through 25, inclusive, Defendants and Respondents.	CASE NO. SV91-0164 PLAINTIFF AND PETITIONER'S TAHOE KEYS PROPERTY OWNERS' ASSOCIATION COMPLAINT AND PETITION FOR: 1. Declaratory Relief (re Constitution and Resolutions) (C.C.P. § 1060) 2. Preliminary and Permanent Injunction (C.C.P. § 526); 3. Writ of Mandate (C.C.P. § 1085).

TO: DEFENDANTS AND RESPONDENTS STATE WATER RESOURCES CONTROL BOARD, STATE OF CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD – LAHONTAN REGION, STATE OF CALIFORNIA RESOURCES AGENCY, AND THEIR ATTORNEYS

PRELIMINARY ALLEGATIONS

(Filed June 10, 1991)

1. Plaintiff and Petitioner TAHOE KEYS PROPERTY OWNERS' ASSOCIATION ("TKPOA") is a non-profit mutual benefit corporation as defined by California Corporations Code § 7110 *et seq.*, and is an association created for the purpose of managing a common interest development in accordance with Civil Code § 1351. TKPOA is composed of 1,594 members owning real property located within the area commonly known as "Tahoe Keys", South Lake Tahoe, California.

2. Defendant and Respondent STATE WATER RESOURCES CONTROL BOARD ("STATE BOARD") is an administrative agency of the State of California created by Water Code § 13100 and charged with various duties in connection with water quality control throughout the State, including the administration of the Porter-Cologne Water Quality Act, Water Code § 13000, *et seq.*

3. Defendant and Respondent STATE OF CALIFORNIA RESOURCES AGENCY ("RESOURCES AGENCY") is an administrative agency of the State of California created by Government Code § 12800 *et seq.* and consists of the following pertinent Boards and Departments of the State of California: (1) Defendant and Respondent STATE

WATER RESOURCES CONTROL BOARD, and each California Regional Water Quality Control Board (including Defendant and Respondent LAHONTAN), and the Water Resources Department. The RESOURCES AGENCY is the statutory successor-in-interest to the California Tahoe Regional planning Agency ("CTRPA") pursuant to Government Code § 67132 , *et seq.*

4. Defendant and Respondent STATE OF CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD--LAHONTAN REGION ("LAHONTAN") is an administrative agency of the State of California created by Water Code § 13200 and charged with various duties in connection with water quality control within its geographic region, including the administration of the Porter-Cologne Water Quality Act, Water Code § 13000, *et seq.*

5. TKPOA does not know the true names or capacities of Defendants and Respondents sued herein as DOES 1 through 25, inclusive, and therefore sues such Defendants and Respondents by fictitious names. TKPOA will amend this Complaint and Petition to allege the true names and capacities of such Defendants and Respondents when it has ascertained their names and capacities. TKPOA is informed and believes, and thereon alleges, that each of such fictitiously named Defendants and Respondents are responsible in some manner for the occurrences herein alleged.

OPERATIVE FACTS

6. TKPOA consists of 26 separate subdivisions developed during the 1960's by the Dillingham Development Corporation and others. TKPOA is informed and

believes, and based thereon alleges, the developers of the 26 separate subdivisions (herein generally referred to as "Tahoe Keys") draglined (dry excavation) and filled portions of the Truckee River Marsh pursuant to valid development permits.

7. Tahoe Keys is a waterfront development consisting in part of navigable waterways and channels providing ingress and egress to Lake Tahoe. A copy of a map generally depicting Tahoe Keys is attached hereto, made a part hereof, and marked Exhibit A.

8. The 26 subdivisions comprising TKPOA contain approximately 1,100 single-family residences, 335 townhouse units, and approximately 150 undeveloped residential lots.

9. In or about 1970, the developer conveyed its interests in the common areas of the development to TKPOA.

10. By 1981, all 355 townhouse units within Tahoe Keys had been constructed, and approximately 800 of the 1,249 residential lots were improved with single-family dwellings.

11. As of 1981, Tahoe Keys was improved with streets, curbs, gutters, waterways, canals, utilities, and approximately 800 residential units.

12. In 1972, the Tahoe Regional planning Agency ("TRPA") was formed pursuant to an Act of the United States Congress. TRPA is a bi-state agency consisting of representatives from the States of California and Nevada and discharges its duties pursuant to Government Code § 66,800, *et seq*. TKPOA is informed and believes, and

based thereon alleges, that prior to 1982, TRPA classified Tahoe Keys as a man-modified environment, thereby enabling owners of undeveloped lots within Tahoe Keys to obtain development permits to construct single-family dwellings.

13. Prior to May 7, 1982, but after construction of approximately 800 residential units within Tahoe Keys, the RESOURCES AGENCY's predecessor-in-interest, CTRPA, asserted concurrent jurisdiction with TRPA, and contrary to TRPA, classified Tahoe Keys as a stream environment zone ("SEZ"), thereby precluding those members of TKPOA owning vacant lots from obtaining development permits for construction of single-family dwellings.

14. CTRPA and LAHONTAN refused to classify Tahoe Keys as a man-modified environment, maintaining the area, as improved with streets, curbs, gutters, waterways, canals, utilities and approximately 1,000 residential units, was not man-modified and remained and [sic] SEZ.

15. Commencing in 1982, CTRPA and LAHONTAN refused to grant those members of TKPOA that had not yet constructed single-family residences development permits unless those members paid a Four Thousand Dollars ($4,000.00) per lot development fee ("Mitigation Fee").

16. On May 7, 1982, the CTRPA Governing Board adopted Resolution 82-10 declaring Tahoe Keys to be a man-altered environment, conditioning subsequent single-family residence development for TKPOA's members that had not yet built upon the payment of a $4,000 Mitigation Fee. A copy of CTRPA's Resolution 82-10 is

attached hereto, made a part hereof, and marked Exhibit B.

17. CTRPA Resolution 82-10 purports to find that the original development of Tahoe Keys adversely impacted Lake Tahoe water quality and that the costs of mitigating the alleged adverse impact resulting from the developer's original dragline and fill must be borne by those members of TKPOA that as of May 5, 1982, had not yet constructed their single-family residences. In other words, only those owners that had not yet built were assessed to pay Mitigation Fees for alleged environmental harm they did not create.

18. CTRPA Resolution 82-10 required the execution of a Memorandum of Understanding ("MOU") concerning the disposition of the mitigation funds collected. The MOU required the mitigation funds to be spent within Tahoe Keys. The MOU was not executed by all the parties and has not been complied with by the parties. A copy of the MOU is attached hereto, made a part hereof, and marked Exhibit C.

19. On May 13, 1982, LAHONTAN adopted Resolution 82-8 wherein it found the land within the jurisdiction of TKPOA did not exhibit the characteristics of a SEZ and that modifications of the SEZ occurred prior to June 11, 1972, the effective date of the North Lahontan Base and Interim Water Quality Control Plan for the North Lahontan Region. A copy of LAHONTAN Resolution 82-8 is attached hereto, made a part hereof, and marked Exhibit D.

20. LAHONTAN's Resolution 82-8, like CTRPA's Resolution 82-10, imposes a Mitigation Fee on those

members of TKPOA that had not yet built upon their lots. The purpose of the Fee is to compel those members of TKPOA that had not yet constructed single family residences to pay for mitigation measures designed to offset the impacts of the original dragline and fill of the Tahoe Keys occupancy prior to 1972.

21. LAHONTAN's Resolution 82-8 also required payment of a $4,000 development fee as a condition of a permit to build a single-family residence. This $4,000 is not in addition to the $4,000 required by CTRPA's Resolution 82-10.

22. Unlike CTRPA's Resolution 82-10, LAHONTAN's Resolution 82-8 does not require the execution of an MOU. Further, LAHONTAN's Resolution 82-8 conflicts with CTRPA's Resolution 82-10 in that CTRPA's Resolution 82-10 requires the mitigation funds to be spent within Tahoe Keys, whereas LAHONTAN's Resolution 82-8 requires the proceeds to be spent within the Tahoe Basin, without any direct benefit to Tahoe Keys.

23. Both CTRPA Resolution 82-10 and LAHONTAN Resolution 82-8 require that, in addition to the payment of the $4,000 Mitigation Fee, all new construction occurring within Tahoe Keys contain mitigation measures sufficient to offset the actual consequences of the construction of each new residence.

24. TKPOA is informed and believes, and based thereon alleges, that its members have paid approximately One Million Five Hundred Thousand Dollars ($1,500,000.00) in Mitigation Fees from 1982 to present.

25. TKPOA is informed and believes, and based thereon alleges, that neither CTRPA, its successor the RESOURCES AGENCY, STATE BOARD, nor LAHONTAN, have expended any of the funds collected as Mitigation Fees.

26. By letter dated February 15, 1991, TKPOA demanded the cessation of the collection of the Mitigation Fee and the return of all funds collected to date. A copy of the February 15, 1991, letter is attached hereto, made a part hereof, and marked Exhibit E.

27. On May 10, 1991, pursuant to TKPOA's demand, LAHONTAN conducted a public hearing concerning TKPOA's February 15, 1991, request and, by Resolution 6-91-47, denied TKPOA's request in its entirety. Resolution 6-91-47 confirms and ratifies LAHONTAN's position that new owners must bear the costs for mitigating the impacts resulting prior to 1972. A copy of Resolution 6-91-47 is attached hereto, made a part hereof, and marked Exhibit F.

28. LAHONTAN, STATE BOARD, and RESOURCES AGENCY continue to require the payment of $4,000 from each member of TKPOA seeking a development permit to construct a single-family residence.

29. TKPOA is informed and believes, and based thereon alleges, that its members have paid the $4,000 Mitigation Fee unwillingly rather than jeopardize their opportunity to construct due to, *inter alia*, the limited sewer capacity available in the South Lake Tahoe area and the risk of additional land use restrictions being imposed by TRPA, LAHONTAN, STATE BOARD and other governmental agencies asserting jurisdiction within

Tahoe Keys, including, but not limited to, the United States Army Corp of Engineers, the California State Lands Commission, and the California Department of Fish and Game.

FIRST CAUSE CF ACTION

(Declaratory Relief)

30. TKPOA hereby repleads, realleges and reaffirms the allegations set forth in Paragraphs 1 through 29, inclusive.

31. An actual controversy has arisen and now exists between TKPOA on the one hand and LAHONTAN, the STATE BOARD and the RESOURCES AGENCY on the other, relating to the parties' respective rights and duties under, *inter alia*, the and [sic] Fifth and Fourteenth Amendments to the United States Constitution and Article 1, Section 7, of the California Constitution. TKPOA contends that its members have been and are denied both due process and equal protection of the laws and, further, that a taking has occurred by reason of the exaction of the $4,000 Mitigation Fee, resulting from the enforcement of CTRPA Resolution 82-10 and by LAHONTAN Resolution 82-8. TKPOA further contends a constitutionally permissible nexus does not exist between the Mitigation Fee imposed and the environmental consequence of the construction of a new single-family residence within Tahoe Keys. TKPOA further contends Defendants and Respondents do not have the authority to exact a Mitigation Fee.

32. TKPOA is informed and believes, and based thereon alleges, that LAHONTAN, the STATE BOARD

and the RESOURCES AGENCY dispute TKPOA's contentions and contend CTRPA's Resolution 82-10 and LAHONTAN's Resolution 82-8 do not deny TKPOA's members of due process and equal protection, nor that said Resolutions are constitutionally impermissible due to the absence of the requisite nexus. TKPOA is further informed and believes, and based thereon alleges, that LAHONTAN, the STATE BOARD and the RESOURCES AGENCY contend it has the authority to exact a Mitigation Fee from owners of undeveloped properties within Tahoe Keys to offset the claimed adverse environmental consequences of the original development, notwithstanding the fact the new owners are required to and, in fact, do offset the environmental impacts actually resulting from the construction upon their real property.

33. TKPOA requests a declaration of the rights and duties of all parties to this action under these Resolutions and constitutional provisions. A judicial declaration is necessary and appropriate at this time so that TKPOA's members may avoid irreparable injury resulting from LAHONTAN, the STATE BOARD and the RESOURCES AGENCY's interpretation and application of these Resolutions and constitutional provisions.

SECOND CAUSE OF ACTION

(Preliminary and Permanent Injunction)

34. TKPOA hereby repleads, reaffirms and realleges Paragraphs 1 through 33, inclusive.

35. LAHONTAN and the RESOURCES AGENCY threaten to unlawfully proceed with the continued collection of the $4,000 Mitigation Fee and threaten to unlawfully expend all or a portion of the approximately $1,500,000 of Mitigation Fees previously collected. LAHONTAN, the STATE BOARD and the RESOURCES AGENCY also threaten to continue to interpret and apply, *inter alia*, LAHONTAN Resolution 82-8 and CTRPA Resolution 82-10, the Fifth and Fourteenth Amendments of the United States Constitution, and Article 1, Section 7, of the California Constitution in an unlawful manner which will continue to result in improperly enforcing TKPOA's members to choose between paying a $4,000 Mitigation Fee for environmental harm they did not create or waiving their right to develop their property, which constitutes a taking under the Fifth Amendment of the United States Constitution. LAHONTAN, the STATE BOARD and the RESOURCES AGENCY's wrongful conduct will, unless and until restrained and enjoined by order of this Court, cause great and irreparable injury to TKPOA and its members in that (a) in the absence of a temporary restraining order, preliminary and permanent injunction of the collection of this discriminatory Mitigation Fee, TKPOA's members will be forced to choose between paying the unlawful fee or waiving their right to construct their property; (b) in the absence of a temporary restraining order, preliminary and permanent injunction prohibiting the expenditure of the approximately $1,500,000 that was unlawfully collected, Defendants and Respondents may liquidate the funds collected in areas outside of Tahoe Keys in violation of CTRPA Resolution 82-10 while [sic] not conflict with LAHONTAN Resolution 82-8,

thereby subjecting TKPOA and its members to irreparable harm; (c) in the absence of a temporary restraining order, preliminary and permanent injunction, a taking in violation of the Fifth Amendment of the United States Constitution will continue to occur; (d) a constitutionally impermissible exaction will continue to occur whereby TKPOA's members constructing new residences will be assessed to mitigate claimed environmental harm they did not create.

36. Other than the relief requested herein, TKPOA has no adequate remedy at law to prevent or forestall this irreparable injury.

PEREMPTORY WRIT OF MANDATE
AGAINST THE STATE BOARD, LAHONTAN
AND THE RESOURCES AGENCY

37. TKPOA repleads, realleges and reaffirms paragraphs 1 through 36, inclusive.

38. Under applicable constitutional law, statutory provisions, and administrative Resolutions 82-10 and 82-8, the Fifth and Fourteenth Amendments to the United States Constitution, and Article 1, Sections 13, 16 and 17 of the California Constitution, the STATE BOARD has a clear and present legal duty to terminate collection of the Mitigation Fee and refund all fees collected, together with interest thereon.

39. TKPOA has not exhausted the administrative remedies provided by Water Code Section 13320(a) and California Code of Regulations, Title 23, Section 2050 *et seq.*, authorizing an aggrieved person to petition the

STATE BOARD for review of an act or failure to act by a regional board within thirty (30) days of any action or failure to act by said regional board. TKPOA alleges that it has concurrently filed a petition for administrative review; however, TKPOA alleges a petition for administrative review is wholly inadequate in that it is impossible for the STATE BOARD, within the confines of its procedures, to act expeditiously pursuant to California Code of Regulations, Title 23, Section 2052. The STATE BOARD has up to 270 days from the date it has received written notification that the parties to a petition for review may file a response to the petition to formally dispose of the petition. Moreover, while the Superior Court has jurisdiction to refer matters requiring the Water Board's expertise to the Water Board, the questions presented herein are not technical in nature, the facts as set forth in the attached Resolutions are generally uncontested, and the questions raised are issues of law requiring constitutional interpretation. The Superior Court has concurrent jurisdiction to hear this matter pursuant to *Nat. Audubon Soc. v. Sup. Court of Alpine County,* (1983) 33 Cal. 3d 419.

40. Other than the relief requested herein, TKPOA and its members have no plain, speedy or adequate remedy in the ordinary course of law.

WHEREFORE, TKPOA prays judgment against LAHONTAN, the STATE BOARD and the RESOURCES AGENCY as follows:

1. For the Court to Declare, Adjudge and Decree the legal rights and duties of the parties, which declaration shall state:

(a) LAHONTAN, the STATE BOARD and the RESOURCES AGENCY have violated the constitutional rights of TKPOA and its members by requiring the payment of a $4,000 Mitigation Fee from and after May 7, 1982; and

(b) To declare Resolutions 82-10 and 82-8 null, void, and of no effect, except insofar as said Resolutions require development proposals to contain mitigation measures.

2. For a temporary restraining order, a preliminary injunction, and a permanent injunction enjoining and restraining LAHONTAN, the STATE BOARD and the RESOURCES AGENCY, their agents, servants and employees, and each of them, from continuing to impose and collect the $4,000 Mitigation Fee or any mitigation fee [sic] TKPOA's members.

3. For the Court to:

(a) Issue a Writ of Mandate ordering LAHONTAN, the STATE BOARD and the RESOURCES AGENCY to cease and desist from imposing the $4,000 Mitigation Fee, or mitigation fee, against members of TKPOA;

(b) Order LAHONTAN, the STATE BOARD and the RESOURCES AGENCY to pay to TKPOA all mitigation funds collected pursuant to Resolutions 82-10 and 82-8, including interest thereon at the legal rate; and

(c) stay the administrative proceedings pending before the STATE BOARD.

4. For costs of suit incurred herein.

5. For reasonable attorneys' fees.

6. For such other and further relief as this Court deems proper.

DATED: June 10, 1991.

FELDMAN, SHAW & DeVORE
A Law Corporation

By: /s/ Lewis Feldman
Lewis S. Feldman
Attorneys for Plaintiff
and Petitioner

VERIFICATION

I, GEORGE E. RICH, declare:

1. I am the Treasurer of Plaintiff and Petitioner, the TAHOE KEYS PROPERTY OWNERS' ASSOCIATION, a California non-profit mutual benefit corporation. I have read the foregoing Complaint and Petition and know the contents thereof; the same is true of my personal knowledge, except as to those matters which are therein stated upon my information and belief, and as to those matters, I believe them to be true.

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this Verification was executed on June 10, 1991, at South Lake Tahoe, California.

TAHOE KEYS PROPERTY
OWNERS' ASSOCIATION

By: /s/ George E. Rich
George E. Rich
Its: Treasurer

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APPENDIX I

FELDMAN, SHAW & DeVORE, A LAW CORPORATION
Lewis S. Feldman, State Bar No. 68877
Deborah A. Palmer, State Bar No. 129192
2311 Lake Tahoe Boulevard, Suite 1
South Lake Tahoe, California 96150
Telephone: (916) 544-3731
Facsimile: (916) 541-5142

Attorneys for Plaintiff and Petitioner
TAHOE KEYS PROPERTY OWNERS' ASSOCIATION

IN THE SUPERIOR COURT OF THE
STATE OF CALIFORNIA IN AND FOR THE
COUNTY OF EL DORADO

TAHOE KEYS PROPERTY OWENRS' ASSOCIATION, a non-profit mutual benefit corporation, Plaintiff and Petitioner, vs. STATE WATER RESOURCES CONTROL BOARD; STATE OF CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD – LAHONTAN REGION; STATE OF CALIFORNIA RESOURCES AGENCY, and DOES 1 through 25, inclusive, Defendants and Respondents.	CASE NO. SV91 0164 PLAINTIFF AND PETITIONER'S TAHOE KEYS PROPERTY OWNERS' ASSOCIATION FIRST AMENDED COMPLAINT AND PETITION FOR: 1. Declaratory Relief (re Constitution and Resolutions) (C.C.P. § 1060) 2. Preliminary and Permanent Injunction (C.C.P. § 526); 3. Writ of Mandate (C.C.P. § 1085); 4. Accounting; 5. Constructive Trust.

TO: DEFENDANTS AND RESPONDENTS STATE WATER RESOURCES CONTROL BOARD, STATE OF CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD – LAHONTAN REGION, STATE OF CALIFORNIA RESOURCES AGENCY, AND THEIR ATTORNEYS

PRELIMINARY ALLEGATIONS

(Filed June 14, 1991)

1. Plaintiff and Petitioner TAHOE KEYS PROPERTY OWNERS' ASSOCIATION ("TKPOA") is a non-profit mutual benefit corporation as defined by California Corporations Code § 7110 *et seq.*, and is an association created for the purpose of managing a common interest development in accordance with Civil Code § 1351. TKPOA is composed of 1,594 members owning real property located within the area commonly known as "Tahoe Keys", South Lake Tahoe, California.

2. Defendant and Respondent STATE WATER RESOURCES CONTROL BOARD ("STATE BOARD") is an administrative agency of the State of California created by Water Code § 13100 and charged with various duties in connection with water quality control throughout the State, including the administration of the Porter-Cologne Water Quality Act, Water Code § 13000, *et seq.*

3. Defendant and Respondent STATE OF CALIFORNIA RESOURCES AGENCY ("RESOURCES AGENCY") is an administrative agency of the State of California created by Government Code § 12800 *et seq.* and consists of the following pertinent Boards and Departments of the State of California: (1) Defendant and Respondent STATE

WATER RESOURCES CONTROL BOARD, and each California Regional Water Quality Control Board (including Defendant and Respondent LAHONTAN), and the Water Resources Department. The RESOURCES AGENCY is the statutory successor-in-interest to the California Tahoe Regional Planning Agency ("CTRPA") pursuant to Government Code § 67132, *et seq.*

4. Defendant and Respondent STATE OF CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD – LAHONTAN REGION ("LAHONTAN") is an administrative agency of the State of California created by Water Code § 13200 and charged with various duties in connection with water quality control within its geographic region, including the administration of the Porter-Cologne Water Quality Act, Water Code § 13000, *et seq.*

5. TKPOA does not know the true names or capacities of Defendants and Respondents sued herein as DOES 1 through 25, inclusive, and therefore sues such Defendants and Respondents by fictitious names. TKPOA will amend this Complaint and Petition to allege the true names and capacities of such Defendants and Respondents when it has ascertained their names and capacities. TKPOA is informed and believes, and thereon alleges, that each of such fictitiously named Defendants and Respondents are responsible in some manner for the occurrences herein alleged.

OPERATIVE FACTS

6. TKPOA consists of 26 separate subdivisions developed during the 1960's by the Dillingham Development Corporation and others. TKPOA is informed and

believes, and based thereon alleges, the developers of the 26 separate subdivisions (herein generally referred to as "Tahoe Keys") draglined (dry excavation) and filled portions of the Truckee River Marsh pursuant to valid development permits.

7. Tahoe Keys is a waterfront development consisting in part of navigable waterways and channels providing ingress and egress to Lake Tahoe. A copy of a map generally depicting Tahoe Keys is attached hereto, made a part hereof, and marked Exhibit A.

8. The 26 subdivisions comprising TKPOA contain approximately 1,100 single-family residences, 335 townhouse units, and approximately 150 undeveloped residential lots.

9. In or about 1970, the developer conveyed its interests in the common areas of the development of TKPOA.

10. By 1981, all 335 townhouse units within Tahoe Keys had been constructed, and approximately 800 of the 1,249 residential lots were improved with single-family dwellings.

11. As of 1981, Tahoe Keys was improved with streets, curbs, gutters, waterways, canals, utilities, and approximately 800 residential units.

12. In 1972, the Tahoe Regional Planning Agency ("TRPA") was formed pursuant to an Act of the United States Congress. TRPA is a bi-state agency consisting of representatives from the States of California and Nevada and discharges its duties pursuant to Government Code § 66,800, *et seq*. TKPOA is informed and believes, and

based thereon alleges, that prior to 1982, TRPA classified Tahoe Keys as a man-modified environment, thereby enabling owners of undeveloped lots within Tahoe Keys to obtain development permits to construct single-family dwellings.

13. Prior to May 7, 1982, but after construction of approximately 800 residential units within Tahoe Keys, the RESOURCES AGENCY's predecessor-in-interest, CTRPA, asserted concurrent jurisdiction with TRPA, and contrary to TRPA, classified Tahoe Keys as a stream environment zone ("SEZ"), thereby precluding those members of TKPOA owning vacant lots from obtaining development permits for construction of single-family dwellings.

14. CTRPA and LAHONTAN refused to classify Tahoe Keys as a man-modified environment, maintaining the area, as improved with streets, curbs, gutters, waterways, canals, utilities and approximately 1,000 residential units, was not man-modified and remained and [sic] SEZ.

15. Commencing in 1982, CTRPA and LAHONTAN refused to grant those members of TKPOA that had not yet constructed single-family residences development permits unless those members paid a Four Thousand Dollars ($4,000.00) per lot development fee ("Mitigation Fee").

16. On May 7, 1982, the CTRPA Governing Board adopted Resolution 82-10 declaring Tahoe Keys to be a man-altered environment, conditioning subsequent single-family residence development for TKPOA's members that had not yet built upon the payment of a $4,000 Mitigation Fee. A copy of CTRPA's Resolution 82-10 is

attached hereto, made a part hereof, and marked Exhibit B.

17. CTRPA Resolution 82-10 purports to find that the original development of Tahoe Keys adversely impacted Lake Tahoe water quality and that the costs of mitigating the alleged adverse impact resulting from the developer's original dragline and fill must be borne by those members of TKPOA that as of May 5, 1982, had not yet constructed their single-family residences. In other words, only those owners that had not yet built were assessed to pay Mitigation Fees for alleged environmental harm they did not create.

18. CTRPA Resolution 82-10 required the execution of a Memorandum of Understanding ("MOU") concerning the disposition of the mitigation funds collected. The MOU required the mitigation funds to be spent within Tahoe Keys. The MOU was not executed by all the parties and has not been complied with by the parties. A copy of the MOU is attached hereto, made a part hereof, and marked Exhibit C.

19. On May 13, 1982, LAHONTAN adopted Resolution 82-8 wherein it found the land within the jurisdiction of TKPOA did not exhibit the characteristics of a SEZ and that modifications of the SEZ occurred prior to June 11, 1972, the effective date of the North Lahontan Base and Interim Water Quality Control Plan for the North Lahontan Region. A copy of LAHONTAN Resolution 82-8 is attached hereto, made a part hereof, and marked Exhibit D.

20. LAHONTAN's Resolution 82-8, like CTRPA's Resolution 82-10, imposes a Mitigation Fee on those

members of TKPOA that had not yet built upon their lots. The purpose of the Fee is to compel those members of TKPOA that had not yet constructed single-family residences to pay for mitigation measures designed to offset the impacts of the original dragline and fill of the Tahoe Keys occupancy prior to 1972.

21. LAHONTAN's Resolution 82-8 also required payment of a $4,000 development fee as a condition of a permit to build a single-family residence. This $4,000 is not in addition to the $4,000 required by CTRPA's Resolution 82-10.

22. Unlike CTRPA's Resolution 82-10, LAHONTAN's Resolution 82-8 does not require the execution of an MOU. Further, LAHONTAN's Resolution 82-8 conflicts with CTRPA's Resolution 82-10 in that CTRPA's Resolution 82-10 requires the mitigation funds to be spent within Tahoe Keys, whereas LAHONTAN's Resolution 82-8 requires the proceeds to be spent within the Tahoe Basin, without any direct benefit to Tahoe Keys.

23. Both CTRPA Resolution 82-10 and LAHONTAN Resolution 82-8 require that, in addition to the payment of the $4,000 Mitigation Fee, all new construction occurring within Tahoe Keys contain mitigation measures sufficient to offset the actual consequences of the construction of each new residence.

24. TKPOA is informed and believes, and based thereon alleges, that its members have paid approximately One Million Five Hundred Thousand Dollars ($1,500,000.00) in Mitigation Fees from 1982 to present.

25. TKPOA is informed and believes, and based thereon alleges, that neither CTRPA, its successor the RESOURCES AGENCY, STATE BOARD, nor LAHONTAN, have expended any of the funds collected as Mitigation Fees.

26. By letter dated February 15, 1991, TKPOA demanded the cessation of the collection of the Mitigation Fee and the return of all funds collected to date. A copy of the February 15, 1991, letter is attached hereto, made a part hereof, and marked Exhibit E.

27. On May 10, 1991, pursuant to TKPOA's demand, LAHONTAN conducted a public hearing concerning TKPOA's February 15, 1991, request and, by Resolution 6-91-47, denied TKPOA's request in its entirety. Resolution 6-91-47 confirms and ratifies LAHONTAN's position that new owners must bear the costs for mitigating the impacts resulting prior to 1972. A copy of Resolution 6-91-47 is attached hereto, made a part hereof, and marked Exhibit F.

28. LAHONTAN, STATE BOARD, and RESOURCES AGENCY continue to require the payment of $4,000 from each member of TKPOA seeking a development permit to construct a single-family residence.

29. TKPOA is informed and believes, and based thereon alleges, that its members have paid the $4,000 Mitigation Fee unwillingly rather than jeopardize their opportunity to construct due to, *inter alia*, the limited sewer capacity available in the South Lake Tahoe area and the risk of additional land use restrictions being imposed by TRPA, LAHONTAN, STATE BOARD and other governmental agencies asserting jurisdiction within

Tahoe Keys, including, but not limited to, the United States Army Corp [sic] of Engineers, the California State Lands Commission, and the California Department of Fish and Game.

FIRST CAUSE OF ACTION

(Declaratory Relief)

30. TKPOA hereby repleads, realleges and reaffirms the allegations set forth in Paragraphs 1 through 29, inclusive.

31. An actual controversy has arisen and now exists between TKPOA on the one hand and LAHONTAN, the STATE BOARD and the RESOURCES AGENCY on the other, relating to the parties' respective rights and duties under, *inter alia,* the and [sic] Fifth and Fourteenth Amendments to the United States Constitution and Article 1, Section 7, of the California Constitution. TKPOA contends that its members have been and are denied both due process and equal protection of the laws and, further, that a taking has occurred by reason of the exaction of the $4,000 Mitigation Fee, resulting from the enforcement of CTRPA Resolution 82-10 and by LAHONTAN Resolution 82-8. TKPOA further contends a constitutionally permissible nexus does not exist between the Mitigation Fee imposed and the environmental consequence of the construction of a new single-family residence within Tahoe Keys. TKPOA further contends Defendants and Respondents do not have the authority to exact a Mitigation Fee.

32. TKPOA is informed and believes, and based thereon alleges, that LAHONTAN, the STATE BOARD

and the RESOURCES AGENCY dispute TKPOA's contentions and contend CTRPA's Resolution 82-10 and LAHONTAN's Resolution 82-8 do not deny TKPOA's members of due process and equal protection, nor that said Resolutions are constitutionally impermissible due to the absence of the requisite nexus. TKPOA is further informed and believes, and based thereon alleges, that LAHONTAN, the STATE BOARD and the RESOURCES AGENCY contend it has the authority to exact a Mitigation Fee from owners of undeveloped properties within Tahoe Keys to offset the claimed adverse environmental consequences of the original development, notwithstanding the fact the new owners are required to and, in fact, do offset the environmental impacts actually resulting from the construction upon their real property.

33. TKPOA requests a declaration of the rights and duties of all parties to this action under these Resolutions and constitutional provisions. A judicial declaration is necessary and appropriate at this time so that TKPOA's members may avoid irreparable injury resulting from LAHONTAN, the STATE BOARD and the RESOURCES AGENCY's interpretation and application of these Resolutions and constitutional provisions.

SECOND CAUSE OF ACTION

(Preliminary and Permanent Injunction)

34. TKPOA hereby repleads, reaffirms and realleges Paragraphs 1 through 33, inclusive.

35. LAHONTAN and the RESOURCES AGENCY threaten to unlawfully proceed with the continued collection of the $4,000 Mitigation Fee and threaten to

unlawfully expend all or a portion of the approximately $1,500,000 of Mitigation Fees previously collected. LAHONTAN, the STATE BOARD and the RESOURCES AGENCY also threaten to continue to interpret and apply, *inter alia*, LAHONTAN Resolution 82-8 and CTRPA Resolution 82-10, the Fifth and Fourteenth Amendments of the United States Constitution, and Article 1, Section 7, of the California Constitution in an unlawful manner which will continue to result in improperly enforcing TKPOA's members to choose between paying a $4,000 Mitigation Fee for environmental harm they did not create or waiving their right to develop their property, which constitutes a taking under the Fifth Amendment of the United States Constitution. LAHONTAN, the STATE BOARD and the RESOURCES AGENCY's wrongful conduct will, unless and until restrained and enjoined by order of this Court, cause great and irreparable injury to TKPOA and its members in that (a) in the absence of a temporary restraining order, preliminary and permanent injunction of the collection of this discriminatory Mitigation Fee, TKPOA's members will be forced to choose between paying the unlawful fee or waiving their right to construct their property; (b) in the absence of a temporary restraining order, preliminary and permanent injunction prohibiting the expenditure of the approximately $1,500,000 that was unlawfully collected, Defendants and Respondents may liquidate the funds collected in areas outside of Tahoe Keys in violation of CTRPA Resolution 82-10 while not conflict [sic] with LAHONTAN Resolution 82-8, thereby subjecting TKPOA and its members to irreparable harm; (c) in the absence of a temporary restraining order,

preliminary and permanent injunction, a taking in violation of the Fifth Amendment of the United States Constitution will continue to occur; (d) a constitutionally impermissible exaction will continue to occur whereby TKPOA's members constructing new residences will be assessed to mitigate claimed environmental harm they did not create.

36. Other than the relief requested herein, TKPOA has no adequate remedy at law to prevent or forestall this irreparable injury.

THIRD CAUSE OF ACTION

(Peremptory Writ of Mandate Against the STATE BOARD, LAHONTAN and the RESOURCES AGEANCY [sic])

37. TKPOA repleads, realleges and reaffirms Paragraphs 1 through 36, inclusive.

38. Under applicable constitutional law, statutory provisions, and administrative Resolutions 82-10 and 82-8, the Fifth and Fourteenth Amendments to the United States Constitution, and Article 1, Sections 13, 16 and 17 of the California Constitution, the STATE BOARD has a clear and present legal duty to terminate collection of the Mitigation Fee and refund all fees collected, together with interest thereon.

39. TKPOA has not exhausted the administrative remedies provided by Water Code Section 13320(a) and California Code of Regulations, Title 23, Section 2050 *et seq.*, authorizing an aggrieved person to petition the STATE BOARD for review of an act or failure to act by a regional board within thirty (30) days of any action or

failure to act by said regional board. TKPOA alleges that it has concurrently filed a petition for administrative review; however, TKPPOA alleges a petition for administrative review is wholly inadequate in that it is impossible for the STATE BOARD, within the confines of its procedures, to act expeditiously pursuant to California Code of Regulations, Title 23, Section 2052. The STATE BOARD has up to 270 days from the date it has received written notification that the parties to a petition for review may file a response to the petition to formally dispose of the petition. Moreover, while the Superior Court has jurisdiction to refer matters requiring the Water Board's expertise to the Water Board, the questions presented herein are not technical in nature, the facts as set forth in the attached Resolutions are generally uncontested, and the questions raised are issues of law requiring constitutional interpretation. The Superior Court has concurrent jurisdiction to hear this matter pursuant to *Nat. Audobon Soc. v. Sup. Court of Alpine County*, (1983) 33 Cal. 3d 419.

40. Although TKPOA is entitled to pursue administrative remedies concerning LAHONTAN's Resolution 82-8, the STATE BOARD does not have jurisdiction to determine the applicability of CTRPA Resolution 82-10, nor to resolve the conflict between the two Resolutions. TKPOA contends a judicial determination concerning both Resolutions and all Defendants and Respondents will avoid a multiplicity of actions with potentially differing results.

41. Other than the relief requested herein, TKPOA and its members have no plain, speedy or adequate remedy in the ordinary course of law.

FOURTH CAUSE OF ACTION

(Accounting)

42. TKPOA repleads, realleges and reaffirms Paragraphs 1 through 36, inclusive.

43. Commencing on or about May 5, 1982, Defendants and Respondents compelled TKPOA's members to pay the $4,000 Mitigation Fee as a condition of issuing a development permit for construction of single-family residences upon vacant lots located with Tahoe Keys.

44. The total sum paid by TKPOA's members pursuant to LAHONTAN Resolution 82-8 and CTRPA Resolution 82-10 is unknown to TKPOA and cannot be ascertained without an accounting of the actual sums collected by Defendants and Respondents from TKPOA's members. TKPOA is informed and believes and based thereon alleges that the amount collected and owed is approximately $1,500,000.00.

45. On or about February 15, 1991, TKPOA demanded that LAHONTAN pay all sums collected pursuant to Resolution 82-8 to TKPOA, but LAHONTAN has failed and refused, and continues to fail and refuse, to return the improperly collected funds to TKPOA. *See* Exhibit E to Complaint.

FIFTH CAUSE OF ACTION

(Constructive Trust)

46. TKPOA repleads, realleges and reaffirms Paragraphs 1 through 36, inclusive, and Paragraphs 43, 44 and 45, inclusive.

47. By virtue of Defendants and Respondents unlawful collection of the Mitigation Fees from TKPOA's members, Defendants and Respondents hold the sums collected, together with interest thereon, as a constructive trustee for TKPOA's members.

WHEREFORE, TKPOA prays judgment against LAHONTAN, the STATE BOARD and the RESOURCES AGENCY as follows:

1. For the Court to Declare, Adjudge and Decree the legal rights and duties of the parties, which declaration shall state:

(a) LAHONTAN, the STATE BOARD and the RESOURCES AGENCY have violated the constitutional rights of TKPOA and its members by requiring the payment of a $4,000 Mitigation Fee from and after May 7, 1982; and

(b) To declare Resolutions 82-10 and 82-8 null, void, and of no effect, except insofar as said Resolutions require development proposals to contain mitigation measures.

2. For a temporary restraining order, a preliminary injunction, and a permanent injunction enjoining and restraining LAHONTAN, the STATE BOARD and the RESOURCES AGENCY, their agents, servants and employees, and each of them, from continuing to impose and collect the $4,000 Mitigation Fee or any mitigation fee [sic] TKPOA's members.

3. For the Court to:

(a) Issue a Writ of Mandate ordering LAHONTAN, the STATE BOARD and the RESOURCES AGENCY

to cease and desist from imposing the $4,000 Mitigation Fee, or any mitigation fee, against members of TKPOA;

(b) Order LAHONTAN, the STATE BOARD and the RESOURCES AGENCY to pay to TKPOA all mitigation funds collected pursuant to Resolutions 82-10 and 82-8, including interest thereon at the legal rate; and

(c) Stay the administrative proceedings pending before the STATE BOARD.

4. For the Court to:

(a) Order an accounting between TKPOA and Defendants and Respondents concerning all funds collected from TKPOA's members pursuant to Resolution 82-10 and Resolution 82-8;

(b) For payment over to TKPOA of the amount due from Defendants and Respondents as a result of the account with interest thereon at the legal rate from and after May 7, 1982.

5. For the Court to:

(a) Issue an order declaring that Defendants and Respondents hold the Mitigation Fees collected in trust for TKPOA's members;

(b) To issue an order compelling Defendants and Respondents to pay to TKPOA the Mitigation Fees collected, together with interest thereon from and after May 7, 1982.

6. For costs of suit incurred herein.

7. For reasonable attorneys' fees.

8. For such other and further relief as this Court deems proper.

DATED: June 13, 1991.

FELDMAN, SHAW & DeVORE
A Law Corporation

By: /s/ Lewis S. Feldman
Lewis S. Feldman
Attorneys for Plaintiff
and Petitioner

VERIFICATON

I, GEORGE E. RICH, declare:

1. I am the Treasurer of Plaintiff and Petitioner, the TAHOE KEYS PROPERTY OWNERS' ASSOCIATION, a California non-profit mutual benefit corporation. I have read the foregoing Complaint and Petition and know the contents thereof; the same is true of my personal knowledge, except as to those matters which are therein stated upon my information and belief, and as to those matters, I believe them to be true.

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this Verification was executed on June 13, 1991, at South Lake Tahoe, California.

TAHOE KEYS PROPERTY
OWNERS' ASSOCIATION

By: /s/ George E. Rich
George E. Rich
Its: Treasurer

[Exhibit A Omitted in Printing. Refer to Appendix 8.]

[Exhibit B Omitted in Printing. Refer to Appendix 6.]

EXHIBIT C

MEMORANDUM AGREEMENT OF UNDERSTANDING BETWEEN TAHOE KEYS PROPERTY OWNERS' ASSOCIATION, CALIFORNIA TAHOE REGIONAL PLANNING AGENCY & LAHONTAN REGIONAL WATER CONTROL BOARD

THIS AGREEMENT, made and entered into this ___ day of May, 1982, in the State of California, by and between the TAHOE KEYS PROPERTY OWNERS' ASSOCIATION (TKPOA), the CALIFORNIA TAHOE REGIONAL PLANNING AGENCY (CTRPA), through its Executive Officer, Dennis Winslow, and LAHONTAN REGIONAL WATER CONTROL BOARD (LAHONTAN) by and through its Executive Officer, Roy Hampson.

This Memorandum Agreement of Understanding sets forth the respective responsibilities of the parties to this Agreement, pursuant to which, the parties will structure, fund and administer the Tahoe Keys mitigation measures set forth below.

Recitals

A. In or about February, 1981, representatives of TKPOA requested CTRPA and LAHONTAN to reclassify

the subdivision known as Tahoe Keys from Land Capability Class 1B to Land Capability Class 6 or 7.

B. Part of the TKPOA reclassification request contemplated creation of a "mitigation fund" to be utilized to mitigate adverse water quality impact, if any, within Tahoe Keys.

C. After full public hearings on the TKPOA proposal, the CTRPA Governing Board determined that the requirements of the CTRPA Regional Plan with respect to changes in land classification of man modified areas had not been satisfied and that therefore the request would be denied without prejudice to a resubmittal. The governing body directed the CTRPA staff to assist TKPOA in conducting studies so that a new application could be considered prior to the operation of a 1982 building permit allocation system. The study was expected to examine, e.g., the extent to which, if any, continued construction in Tahoe Keys would cause water quality degredation [sic] of the waters of Lake Tahoe.

D. CTRPA entered into contracts with the Regents of the University of California for work by the Tahoe Research Group (TRG) and Phillip Williams & Associates (WILLIAMS) for the purpose of obtaining data and evaluating the impact, if any, of further development within the Tahoe Keys on water quality within Tahoe Keys and Lake Tahoe.

E. TKPOA retained Fred R. McLaren to examine the data obtained by TRG and WILLIAMS.

F. TRG and WILLIAMS issued a "Joint Summary of Water Quality/Hydrology Study, Tahoe Keys, South Lake

Tahoe, California" (Joint Summary), dated March 5, 1982, incorporated by reference herein.

G. TKPOA is aware of the results of TRG and WILLIAMS, and although not in agreement with the findings thereof, TKPOA has elected not to dispute the findings of TRG and WILLIAMS for the purpose of said applications.

H. On March 6, 1982, the CTRPA Governing Board adopted Resolutio[sic] 82-6, finding Tahoe Keys to be substantially man-altered, refraining from designating Tahoe Keys a Substantially Altered Environment for the purpose of the CTRPA 1980 Regional Plan until an approved mitigation plan was submitted.

AGREEMENT

1. TKPOA, as and for its "mitigation plan" shall, implement the following:

(a) Prohibit the use of fertilizers on any property now owned or controlled by TKPOA, as well as on any new development within Tahoe Keys, and to refrain from approving applications for new construction unless landscaping is in conformance with TKPOA Landscaping Criteria and Guide to Planting submitted with TKPOA'S request to reclassify the Tahoe Keys dated February 13, 1981.

(b) TKPOA shall implement a revegetation plan in accordance with the Joint Summary Recommendation No. 2, except that the plantings shall not be limited to Willow, Aspen, Cottonwood, and Lodgepole Pine. Further, the revegetation program shall not be initiated without

CTRPA and Lahontan approval. The purpose is to mitigate water quality impacts and reduce water consumption.

(c) TKPOA shall initiate an experimental program concerning its water circulation system and treatment plant in accordance with Recommendation 3 of the Joint Summary.

(d) TKPOA shall adopt a formal set of criteria pertaining to the conditions of flooding and the opening of the flood gates between Tallac Lagoon and the Tahoe Keys Lagoon System in accordance with Recommendation No. 6 of the Joint Summary.

(e) TKPOA shall comply with Recommendation No. 7 of the Joint Summary and will work with the governmental agencies having jurisdiction over the Tahoe Valley drainage basin.

2. The parties hereby agree that the total mitigation fee to be assessed against owners of unimproved lots in Tahoe Keys shall be determined in accordance with the formula set forth on the Lahontan Staff Summary and Recommendations, Review of Management and Mitigation Plans, and Determination of 1982 Development Levels for Tahoe Keys Development, Figure 3, Submitted to the State Water Resources Control Board during their April 1982 meeting, except that the nitrogen contribution of Tahoe Keys development shall be reduced to conform with the final findings of the Joint Summary. Application of the formula results in a mitigation fee, per buildable lot, of $4,000.00 (hereafter the mitigation fee).

3. The mitigation fee shall be collected by CTRPA during the 1982 building season and thereafter the mitigation fee shall be collected by CTRPA's successor. No less than $1,000.00 of each mitigation fee collected shall be utilized for revegetation within Tahoe Keys for the 1982 building season. The parties hereto shall agree as to whether or not additional funds shall be allocated to revegetation during the 1982 season, and further, whether any funds whatsoever shall be allocated for revegetation from the mitigation fund for subsequent years.

4. Seven hundred fifty dollars ($750.00) of each mitigation fee shall be paid to TAHOE REGIONAL PLANNING AGENCY (TRPA) pursuant to TRPA'S 208 Plan.

5. The parties shall ascertain the financial impact of implementing Recommendation No. 5 of the Joint Summary, pumping of Tahoe Keys lagoon waters to Tallac Lagoon and Pope Marsh. The Plan shall be implemented so long as the parties determine it is financially feasible to do so. The cost of the Plan shall be paid for out of the mitigation fees.

6. It is the intent of the parties that mitigation fees collected be utilized for on-site mitigation, if such mitigation is best effective.

7. The parties hereto agree that the mitigation fee aforesaid, as collected, may be used as matching funds for a public entity to obtain federal or state grants for erosion control projects in or immediately adjacent to Tahoe Keys subject to approval of CTRPA or its designee.

TAHOE KEYS PROPERTY
OWNERS' ASSOCIATION

By_____
Joseph J. Imbach, President

By_____

By_____

APPROVED AS TO FORM & CONTENT:

FELDMAN, SHAW & DE VORE

By_____
Leslie J. Shaw

CALIFORNIA TAHOE
REGIONAL PLANNING
AGENCY

By_____
Dennis Winslow
Executive Officer

APPROVED AS TO FORM & CONTENT:

By_____
Craig Thompson
Deputy Attorney General

LAHONTAN REGIONAL WATER
CONTROL BOARD

By_____

APPROVED AS TO FORM & CONTENT:

By_____

[Exhibit D Omitted in Printing. Refer to Appendix 5.]

EXHIBIT E

FELDMAN, SHAW & DeVORE
A LAW CORPORATION
SUITE 17 TAHOE PLAZA PROFESSIONAL BUILDING
2301 LAKE TAHOE BOULEVARD
POST OFFICE BOX 2000J
SOUTH LAKE TAHOE, CALIFORNIA 95705
TELEPHONE (916) 544-3731
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LESLIE J. SHAW
LEWIS S. FELDMAN
DAVID L. DeVORE
CATHERINE L. DiCAMILLO
JOSEPH W. TILLSON
DEBORAH A. PALMER

NEVADA OFFICE
POST OFFICE BOX 11415
ZEPHER COVE, NEVADA 89448
TELEPHONE (702)588-5311

PLEASE REPLY TO [ ] CALIFORNIA OFFICE
[ ] NEVADA OFFICE

February 15, 1991

Harold Singer, Executive Officer
State Water Resources Control
Board – Lahontan Region
P.O. Box 9428
South Lake Tahoe, CA 95731-2428

Dave Zieglar, Executive Director
Tahoe Regional Planning Agency
P.O. Box 1038
Zephyr Cove, NV 89448

Re: Tahoe Keys Water Quality Mitigation Fund

Gentlemen:

Please be advised this office is counsel to the Tahoe Keys Property Owners' Association, a non-profit mutual benefit corporation ("TKPOA"), representing the property

owners residing within the area generally known as Tahoe Keys, South Lake Tahoe, California. For the reasons set forth below, TKPOA demands the immediate cessation of the imposition of water quality mitigation fees pursuant to CTRPA Ordinance 82-10 and Lahontan Board Resolution 82-8, and the return of all funds collected thereunder.

In 1982, the Tahoe Regional Planning Agency ("TRPA") re-classified the Tahoe Keys as a man-modified environment. Previously, the area had been classified as a stream environment zone. The California Tahoe Regional Planning Agency ("CTRPA"), however, maintained concurrent jurisdiction with TRPA and refused to re-classify the area "man-modified" until it adopted Ordinance 82-10, authorizing the imposition of a "mitigation fee" to remedy, in part, the naturally occurring water quality benefits lost by reason of the original dredge and fill of the Truckee Marsh.

The adoption of CTRPA Ordinance 82-10, as well as Lahontan Resolution No. 82-8, followed the publication of a study by the Tahoe Research Group ("TRG") dated February 24, 1982. The TRG study concluded that high levels of nitrogen continued to be released after decomposed organic material was compacted to form the Keys. A supplemental study by Phillip Williams and Associates ("Williams") postulated the resulting nutrient rich waters of Tahoe Keys interchanged with the more sterile waters of the Lake as a consequence of a temperature differential between the Keys and the Lake. TKPOA disputed the findings of both studies. It is noteworthy water quality sampling conducted during the intervening years contradicts the findings of both the Williams and TRG studies.

Nonetheless, since 1982, owners of unimproved parcels within the Tahoe Keys have paid the "mitigation fee" calculated, at least in part, on the disputed studies. It is undisputed, however, the cornerstone of the mitigation fee was the conclusion that the original development (the dredge and fill of the Truckee Marsh) caused the release of nutrients into the Keys' lagoons, and not the subsequent construction of single-family residences on unimproved lots. In other words, CTRPA and Lahontan reasoned that new construction (post 1981) within Tahoe Keys had to pay for the consequences of the original 1960s dredge and fill. TKPOA has consistently questioned the fairness of compelling owners of undeveloped lots to pay for harm they did not cause.

Since 1982, approximately $1,500,000 has been collected as "mitigation fees", none of which has been expended for any water quality improvement purpose. As we understand it, Lahontan and TRPA maintain the funds collected may not be spent to "directly benefit water quality exclusively within Tahoe Keys" but, rather, must be spent in such a way that Tahoe Keys may benefit from a project or projects, as well as surrounding areas. While TKPOA has always opposed this position, the issue is moot since the collection of the fee or any expenditure of the funds collected is violative of state and federal law.

In *Nollan v. The California Coastal Commission* (1987), 43 U.S. 825, 107 S.Ct. 3141, 97 Law at 677, the United States Supreme Court was confronted with an analagous situation. The Nollans applied for a permit to replace their beachfront bungalow with a new three-bedroom residence. The California Coastal Commission approved the permit, conditioned upon the Nollans grant of a lateral

public easement. The Supreme Court held the condition imposed was not "reasonably related" to the consequence of the proposed development. *Id.* at 3148. The Court declared the condition of approval a constitutionally impermissible exaction. It is noteworthy that while the *Nollan* Court concluded the lateral public easement to the beach constituted a legitimate public interest, it nonetheless held the extraction from the Nollans thereof "utterly fails" to respond to the consequence of the development. In other words, the nexus between the proposed condition and the consequence of the proposed development had not been established. *Id.* 3148-3149. The court held the Coastal Commission abused its discretion by conditioning approval of the new development on the grant of a lateral access easement by the Nollans. While the proposed easement may have very well been desirable from the public's perspective, a sufficient relationship between the proposed condition and the consequence of the new development had not been established. The Nollans were relieved of the grant of easement since the required nexus did not exist.

Nollan made clear the condition imposed must address the impact caused. *See, Logtin's* California Land Use, § 8222[2], 2d. Supp. 1990, at p. 136. The CTRPA and Lahontan record make abundantly clear the condition imposed, a water quality mitigation fee, was assessed to address the impacts of the original development of the Keys and its waterways, *not* the actual impact of the subsequent construction of new private residences. CTRPA's Ordinance 82-10 recites this fact in its preamble:

> . . . this study [TRG] concludes that further development on subdivided land within the

> Tahoe Keys development *will not exacerbate water quality problems created by alteration of the stream zone provided appropriate mitigation is included with development proposals.* . . .
>
> WHEREAS, partial mitigation of the natural treatment capacity, lost by the modification of the Truckee Marsh, can be accompanied by various onsite and offsite mitigation measures within Tahoe Keys Development, or at other locations within the Lake Tahoe Basin;
>
> WHEREAS, the construction and continuing . . . operations *of the now existing . . . lagoons and peninsulas contribute significant quantities of nutrients to the water of Lake Tahoe.* (Emphasis added.)

Lahontan Resolution No. 82-8 contains similar findings:

> Further development on subdivided land within the Tahoe Keys development under the jurisdiction of the TKPOA, if suitably mitigated, will not exacerbate water quality problems created by alteration of the stream environemnt [sic] zone; and
>
> * * *
>
> A mitigation fee of $4000 per vacant lot to be developed within the TKPOA portion of the Tahoe Keys development has been determined by the Regional Board staff . . . to be sufficient to insure adequate implementation of the mitigation measures required. . . .
>
> * * *
>
> Payment of such mitigation fee shall precede any development on each lot.

As stated in both the Ordinance and the Resolution, the fee is assessed to rectify the effects of past development, not new construction. New owners are called upon to pay for the impacts of the original development. The Ordinance and Resolution recognize that the construction of new residences "will not exacerbate water quality problems created by alteration of the stream zone" if "appropriate mitigation is included with development proposals." A legitimate condition of approval is the requirement that new construction utilize best management practices, whereas imposing a monetary fee to offset consequences of the original development does not meet constitutional requirements.

In *Surfside Colony, Ltd. v. California Coastal Commission*, 91 Daily Journal DAR 767 (Jan. 15, 1991), the California Court of Appeal overturned the California Coastal Commission's attempt to impose a "condition of approval" upon Surfside's application for a permit to undertake emergency erosion control repair. The Coastal Commission sought to condition the requested permit upon Surfside's grant of public beach access to its gated beach. The court, following *Nollan*, concluded the Commission lacked "substantial evidence" upon which to impose its condition of approval, since there was no nexus between the erosion control project and public beach access. In reviewing the rule enunciated in *Nollan*, the *Surfside* court observed:

> "The Court thus concluded requiring relinquishment of the owners' right to exclude others from their private beach as a condition of the proposed construction amounted to virtual extortion. (*See* 483 U.S., at p. 837.)

* * *

" . . . *Nollan* requires a 'close connection' between the burden and the condition."

Id. at pp. 768, 769.

Likewise, there is no nexus between the mitigation fee imposed to offset the treatment capacity lost by modification of the Truckee Marsh and the consequence of constructing a new residence within Tahoe Keys. Owners have suffered the exaction because of "virtual extortion", an inability to otherwise build upon their lots. To hold new construction responsible for the claimed detriment caused by Dillingham over 20 years ago fails to meet the nexus test and is therefore constitutionally impermissible.

In 1982, a Memorandum of Understanding ("MOU") was prepared for signature by TKPOA, CTRPA and Lahontan. All parties failed to execute the MOU. This document dealt with the collection of the mitigation fees which, under *Nollan,* are unconstitutional since the required "nexus" is clearly lacking. Please be advised TKPOA maintains the 1982 MOU is void. (Civil Code Section 3412).

It is evident the mitigation fee was imposed to compensate for the "natural treatment capacity, lost by the modification of the Truckee Marsh" and not to mitigate the actual impacts resulting from the construction of new single-family residences, impacts which are mitigated with the individual "development proposals". No nexus has been established between the water quality mitigation fee and new development. On the contrary, absolutely no lawful justification exists for the imposition of a special Tahoe Keys' surcharge. Accordingly, TKPOA

demands the immediate cessation of the water quality mitigation surcharge and return of all water quality mitigation funds collected from TKPOA owners forthwith.

The foregoing should not be construed as evidence of any unwillingness by TKPOA to participate in water quality projects that have a direct benefit within Tahoe Keys. TKPOA looks forward to the implementation of the Pope Marsh flooding project and will continue to cooperate with the interested agencies to implement the project. TKPOA is concerned about water quality at Lake Tahoe, and looks forward to addressing issues of mutual concern. Imposition of the water quality mitigation fee, however, is unfair to owners of unimproved lots and, after nine years, has generated nothing but passbook interest.

We hereby request this matter be placed on the next agenda. We respectfully request your honorable Boards direct cessation of the unlawful surcharge and return of the mitigation fees collected, together with accrued interest. Please contact me if you have any questions concerning the foregoing.

Sincerely,

FELDMAN, SHAW & DeVORE
A Law Corporation

By:
Lewis S. Feldman

LSF/jps

cc: California State Resources Agency
Attn: Chris Sproul
Tahoe Keys Property Owners' Association

APPENDIX J

FELDMAN, SHAW & DeVORE, A LAW CORPORATION
Lewis S. Feldman, State Bar No. 68877
Deborah A. Palmer, State Bar No. 129192
2311 Lake Tahoe Boulevard, Suite 1
South Lake Tahoe, California 96150
Telephone: (916) 544-3731
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Attorneys for Plaintiff and Petitioner
TAHOE KEYS PROPERTY OWNERS' ASSOCIATION

IN THE SUPERIOR COURT OF THE
STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF EL DORADO

TAHOE KEYS PROPERTY OWNERS' ASSOCIATION, a non-profit mutual benefit corporation, Plaintiff and Petitioner, vs. STATE WATER RESOURCES CONTROL BOARD; STATE OF CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD – LAHONTAN REGION; STATE OF CALIFORNIA RESOURCES AGENCY, and DOES 1 through 25, inclusive, Defendants and Respondents.	CASE NO. SV91-0164 PLAINTIFF AND PETITIONER'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF *EX PARTE* APPLICATION FOR TEMPORARY RESTRAINING ORDER AND ORDER TO SHOW CAUSE DATE: July 10, 1991 TIME: 9:00 a.m. DEPT: Not Assigned TRIAL DATE: N/A (Filed July 9, 1991)

Plaintiff and Petitioner TAHOE KEYS PROPERTY OWNERS' ASSOCIATION ("TKPOA") submits the following points and authorities in support of its Application for Temporary Restraining Order and an Order to Show Cause why a preliminary injunction should not issue restraining Defendants and Respondents from imposing, assessing, or collecting a $4,000 per vacant lot development fee ("Mitigation Fee") from members of TKPOA that are entitled to construct single-family residences upon their vacant lots located within those subdivisions constituting the area generally known as "Tahoe Keys" in violation of the Fifth and Fourteenth Amendments of the United States Constitution and in violation of Article I, Section 7, of the California Constitution, and to show cause why Defendants and Respondents should not be restrained from expending the approximately $1,500,000 of Mitigation Fees collected to date.

A. WHERE ANY ONE OR MORE OF THE STATUTORY GROUNDS THEREFOR EXIST, THE COURT MAY GRANT AN INJUNCTION REQUIRING A PERSON TO REFRAIN FROM A PARTICULAR ACT DURING THE PENDENCY OF THE ACTION.

Code of Civil Procedure, Section 525

1. Procedural History

On June 17, 1991, TKPOA applied for a temporary restraining order and an order to show cause why preliminary injunction should not issue. A hearing was held on June 20, 1991, regarding the Ex Parte Application for Temporary Restraining Order and a hearing was scheduled for June 26, 1991, regarding the issue of preliminary

injunction. On June 20, 1991, TKPOA's Application for Temporary Restraining Order was denied:

> "The court cannot find that there is a danger of irreparable harm occurring to Petitioner [if] the Temporary Restraining Order is not granted."
>
> (Minute Order, dated June 20, 1991.)

At that time, it was represented to the Court by counsel for the California Regional Water Quality Control Board, Lahontan Region ("Lahontan") that Lahontan did not have any immediate plans to disburse the over $1.5 million collected over the past nine years from the TKPOA members. (*See* Declaration of Deborah A. Palmer, including letters attached ("Palmer Declaration").) Obviously, the Court did not find any irreparable harm if the fund remained intact and denied the temporary restraining order. In addition, based on Lahontan's attorney's representation, TKPOA in good faith agreed to take the preliminary injunction hearing off calendar. After all, the fund collected from TKPOA members had not been invaded for nine years.

On July 2, 1991, at 4:45 p.m., two weeks later, TKPOA received notice from Harold Singer, Lahontan's Executive Officer, that Lahontan intended to calendar for Board approval on July 11-12, 1991, the expenditure of the Tahoe Keys Property Owners' Mitigation Fund for USFS Monitoring of Pope Marsh, an area outside of the Tahoe Keys subdivision. (A true and correct copy of the letter and the Agenda for the Board Meeting are attached as Exhibits to Palmer Declaration.) Mr. Singer requested a

response by July 10, 1991 (a mere five working days after notice) to the proposed expenditure of the funds.

On July 7, 1991, TKPOA's attorney, Lewis S. Feldman, severely broke his collarbone, and on July 8, 1991, the undersigned contacted Lahontan's counsel to request the matter be taken off the Board Agenda for one month to allow Mr. Feldman to continue to represent TKPOA on this matter. (Palmer Declaration.) Lahontan's counsel indicated he had no authority to do so; when the undersigned requested that he contact the person with authority, he said he could not until the night before the hearing to authorize expenditure. (*Ibid.*) With the matter scheduled for Friday, July 12, 1991, the undersigned requested a hearing on *ex parte* application for a temporary restraining order.

2. TKPOA Is Entitled to a Temporary Restraining Order and Order to Show Cause Re: Preliminary Injunction

TKPOA seeks an order restraining Lahontan from collecting the $4,000 Mitigation Fee from its members pending resolution by the Court on whether or not the Fee is constitutional. In addition, TKPOA seeks a restraining order from Lahontan from expending the $1.5 million dollars previously collected from its members pending determination of the constitutionality of its collection. Statutory grounds exist for this request. An injunction may be granted "[w]hen it appears, during litigation, that a party to the action is doing, or threatens, or is about to do, or is procuring or suffering to be done, some act in violation of the rights of another party to the action

respecting the subject of the action, and tending to render the judgment ineffectual." (C.C.P. § 526(3).) Here, Lahontan is planning on authorizing the expenditure of the TKPOA funds at its Board meeting in two days. It is egregious that the funds have been on account for nine years without expenditure, but when TKPOA requests a judicial determination on the constitutionality of the collection, Lahontan decides to spend the money pre-trial. Moreover, on June 20, 1991, the Court was told no expenditures were imminent, and two weeks later the Board has expenditure from the fund on its Agenda. The Agenda itself shows the haste to spend the money before the Court can act in that it was originally calendared as an information item for discussion and then the Agenda was revised to approve an expenditure from the fund. (*See* Palmer Declaration, Exhibit A, Agenda, Item #33.)

The Lahontan budget does not indicate an ability to repay the funds once expended. (Palmer Declaration.) TKPOA members are required to pay into the fund an unconstitutional exaction; then when Court assistance is sought to determine the constitutionality of the fund, Lahontan attempts to circumvent the Court and spend the funds before a preliminary injunction hearing is held. Lahontan should be restrained from expending the funds prior to a formal hearing on preliminary injunction and be restrained from collecting the fund from lot owners pending litigation. (*See* C.C.P. § 526(3).) To collect the funds and expend the funds is a violation of TKPOA's and its members' constitutional rights as set forth in the verified Complaint. The Court should make the determination of the constitutionality of the funds prior to

their expenditure after a hearing on preliminary injunction.

B. WHERE IT APPEARS FROM THE FACTS SHOWN BY ITS VERIFIED COMPLAINT THAT GREAT OR IRREPARABLE INJURY WOULD RESULT TO PLAINTIFF BEFORE ITS APPLICATION FOR AN INJUNCTION CAN BE HEARD ON NOTICE, THE COURT MAY GRANT A TEMPORARY RESTRAINING ORDER WITHOUT NOTICE AND MAKE THE MATTER OF GRANTING AN INJUNCTION RETURNABLE ON AN ORDER TO SHOW CAUSE.

Code of Civil Procedure, Section 527

Violation of a constitutional right is irreparable harm that cannot be remedied by an action at law. (*See Conover v. Hall* (1974) 11 Cal.3d 842, 850, 114 Cal.Rptr. 642; *Brock v. Superior Court* (1939) 12 Cal.2d 605, 610, 86 P.2d 805:

> "[I]t has uniformly been held that one specially interested may enjoin the attempted execution of an unconstitutional statute . . . [and] a statute valid on its face may be unconstitutionally applied. . . . Therefore, if the complaint . . . shows that the petitioners threatened to enforce an unconstitutional law against them, or that their acts in the attempted application of a valid law violated rights guaranteed to all citizens by either the federal or state Constitution, the superior court had jurisdiction to issue an injunction pending hearing and decision upon the issues presented. . . . " (*Brock, supra,* 86 p.2d 807.)

Moreover, the Court is required to exercise its discretion "in favor of the party most likely to be injured. . . . If the denial

of an injunction would result in great harm to the plaintiff, and the defendants would suffer little harm if it were granted, then it is an abuse of discretion to fail to grant the preliminary injunction." (*Robbins v. Super. Ct.* (*County of Sacramento*) (1985) 38 Cal.3d 199, 206, 211 Cal.Rptr. 398, 401.)

In this case, Plaintiff is suffering great and irreparable harm by the denial of a temporary restraining order. Filed concurrently herewith is the Declaration of one of TKPOA's members who indicates he cannot build his residence unless he pays the $4,000 Mitigation Fee to Lahontan. (Declaration of Gregory A. Bennallack.) The verified Complaint indicates that TKPOA's members have paid approximately $1.5 million dollars to Lahontan under Resolutions that TKPOA submits are unconstitutional. TKPOA is requesting the Court to determine the issue and is not asking for the funds to be returned pending litigation, only that the funds remain intact until the Court determines whether they were collected constitutionally.

It is noteworthy that Defendants will suffer no harm by the the [sic] issuance of restraining orders. They have not used the funds in nine years. Why the apparent hurry to spend the money before the Court can determine the constitutionality of the collection? Balancing of the equities results in favor of the issuance of a temporary restraining order.

C. AN INJUNCTION MAY BE GRANTED WHEN IT APPEARS BY THE COMPLAINT THAT PLAINTIFF IS ENTITLED TO THE RELIEF DEMANDED, INCLUDING RESTRAINING OF THE COMMISSION OR CONTINUANCE OF THE ACT COMPLAINED OF DURING THE PENDENCY OF THE ACTION.

Code of Civil Procedure, Section 526(1)

The second prong test to be determined in issuing a restraining order is whether the plaintiff has a reasonable probability of prevailing on the merits. (*Robbins, supra*, p. 206, 211 Cal.Rptr., p. 402.) A violation of TKPOA's constitutional rights under the Federal and State Constitutions is alleged in the verified Complaint. (*See* Section E, *infra.*) The violation of a constitutional right is not remedied by a money judgment, but by injunctive relief. (*See Conover, supra; Brock, supra.*)

In addition, the use of the funds contemplated by Lahontan is in contravention of California Tahoe Regional Planning Agency Resolution 82-10. (*See* Complaint, Exhibit B.) Resolution 82-10 requires that priority of use of TKPOA funds be for "onsite" mitigation measures. (*Ibid.*, at p.3, ¶2.) Nevertheless, the proposed expenditure by Lahontan is not onsite at Tahoe Keys, instead Lahontan wishes to spend some of the funds on Pope Marsh, U.S.F.S. property offsite. (*See* Palmer Declaration, Exhibit A, Agenda.) It is highly unlikely that Lahontan will prevail on an expenditure plan that is not even authorized by the Resolutions.

In addition, Lahontan has never pl ed before this Court any authority for collecting the funds from TKPOA's members. TKPOA has presented by verified

Complaint that the CTRPA Resolution required the execution of a Memorandum of Understanding ("MOU") by the parties, but one was never executed. (Complaint, at p. 5, ¶18.) Lahontan also drafted a Resolution, but the Lahontan Resolution is in conflict with the CTRPA Resolution, specifically in how the funds collected are to be spent. (Complaint, at p. 6, U22.) unless Lahontan is restrained, it will attempt to expend the funds according to its Resolution, but not according to the CTRPA Resolution and in contravention of TKPOA's right to be heard on the constitutional issue. The authority of Lahontan to collect and expend the fees has not been determined by the Court, and TKPOA submits by verified Complaint and Declarations its reasons why the collection and expenditure of the funds is unconstitutional. Based on Lahontan's lack of authority to collect and expend the funds, it is reasonably probable that TKPOA will prevail on the merits at the hearing on preliminary injunction.

D. AN INJUNCTION MAY BE GRANTED WHEN IT APPEARS BY THE COMPLAINT THAT THE COMMISSION OR CONTINUANCE OF SOME ACT DURING THE MITIGATION WOULD PRODUCE GREAT OR IRREPARABLE INJURY TO THE PLAINTIFF.

Code of Civil Procedure, Section 526(2)

The constitutional violation by Lahontan is an ongoing violation. (*See* Complaint, Exhibit F, Lahontan Resolution 6-91-47, denying TKPOA's request the funds be returned and not collected in the future based on unconstitutionality; Declaration of Gregory A. Bennallack, representing he cannot build his home unless he pays the fee.) Declaratory relief based on ongoing violations are

not barred by the Statute of Limitations. (*Maguire v. Hibernia Savings & Loan Soc.* (1944) 23 Cal.2d 719, 733, 146 P.2d 673.) Moreover, the case relied upon by TKPOA in its allegation of unconstitutionality, *Nollan v. The California Coastal Commission* (1987) 43 U.S. 825, 107 S.Ct. 3141, 97 L.Ed.2d 677, was decided three years prior to the filing of the Complaint and the cause of action of unconstitutionality accrued within the statute of limitations.

Assuming, *arguendo*, that TKPOA cannot complain as to the constitutionality of the Resolutions themselves because the statute of limitations has run, it still has the right to complain about the unconstitutional ongoing enforcement of the Resolutions. (*See Brock, supra.*) Violations of due process and equal protection are irreparable injuries which should be enjoined. (*See infra.*)

In addition, TKPOA's members have paid the Mitigation Fee under protest in the past. The Declaration of Gregory A. Bennallack indicates that he cannot construct his home unless he pays the fee. Lahontan has basically extorted the Fee from TKPOA members, withholding building permits unless the Fee is paid. This is not a question of voluntary compliance, but of payment under duress and the payments should be enjoined pending this Court's determination of the constitutionality of the exaction.

E. THE MITIGATION FEE CONSTITUTES AN UNCONSTITUTIONAL EXACTION

Lahontan Resolution 82-8 and CTRPA Resolution 82-10 shift the economic burden for pre-1972 environmental detriment to post-1981 single-family construction

within Tahoe Keys. TKPOA contends the $4,000 per vacant lot exaction is constitutionally impermissible since a nexus between post-1981 construction and the claimed harm resulting from the pre-1972 development does not exist. In fact, both Resolutions 82-8 and 82-10 concede this point: the Resolutions require the new owners to fully mitigate the impacts of their new construction *and* pay a fee for the pre-1972 environmental harm.

Both Resolutions permit new construction so long as "appropriate mitigation is included within [new] development proposals." Resolution 82-8. Lahontan and other interested agencies require new development to incorporate "Best Management Practices" to assure that new development does not exacerbate water quality problems. In other words, the singular purpose of the $4,000 per vacant lot Mitigation Fee is to offset the "water quality problems" resulting from the pre-1972 dragline (dry dredge) and fill since new development proposals mitigate the impacts resulting from new development.

Nollan, supra, is dispositive. The *Nollan* Court held that a condition imposed must be "reasonably related" to the consequence of the proposed development. *Id.* at 834. The Coastal Commission required the Nollans to grant a lateral public easement ostensibly to further the public interest in providing public access to the beach, as a condition of granting the Nollans the right to replace their beachfront bungalow with a new three-bedroom home. The Court conceded that public access to the beach is indeed a legitimate public interest, but nonetheless declared the required exaction from the Nollans "utterly fails" to respond to the consequence of the proposed new development. *Id.* at 837. The Court concluded a sufficient

nexus between the imposed condition and consequence of the proposed development had not been established. *Id.* at 839, 840. The Court held the Commission abused its discretion by conditioning approval of the new development on the grant of a lateral access easement.

The Commission argued that the permit condition was justified under its police power. The Court agreed the condition would not constitute a taking under the Fifth Amendment as an exercise of police power if the requisite nexus was established. *Id.* at 836. Since the nexus between public access and construction of a larger residence was, at best, attenuated, the Court found the permit condition unjustified based on the Commission's police power, thus requiring the Commission to either pay for the easement under the Fifth Amendment or eliminate the condition. The Court reasoned:

> "The evident constitutional propriety disappears, however, if the condition substituted for the prohibition utterly fails to further the end advanced as the justification for the prohibition. . . . "

Id. at 837.

In other words, if the condition is reasonably related to the consequence of the development, the public agency's police power may be invoked to impose the condition without invocation of the taking clause of the Fifth Amendment. If the condition is remote, is not reasonably related, with no apparent cause and effect, a taking occurs, compelling compensation.

> "In applying the reasonable relationship nexus to determine the validity of a condition,

the following analysis is now [post *Nollan*] recommended:

"Determine whether the condition substantially advances legitimate government interests. That is,

"1. Is the *purpose* of the regulatory/conditioning action a 'legitimate government purpose?' *and*,

"2. Do the *means used* to achieve the objective 'substantially advance' the intended purpose? *See* § 822[1].

a) Does the *type* of condition imposed address the same type of impact caused by the development? *See* § 822[2]. *And*

b) Is the condition reasonable and fair relative to the *burden created* by the development? *See* § 822[3].

"If the answer to all of the above questions is in the affirmative, the condition is valid relative to the reasonable relationship nexus. Otherwise, it is invalid."

Logtin's California Land Use, § 822 (Reasonable Relationship Nexus), Supp. 1990 at p. 134, 135. (Emphasis original.)

It is evident the Mitigation Fee fails to satisfy either question 2(a) or 2(b) since the Resolutions disclose that new development mitigates its own impacts and the fee is designed to mitigate the impacts resulting from pre-1972 development. The "type of condition imposed" therefore does not mitigate the "type of impact caused by the development" nor is the condition "reasonable and fair

relative to the burden created" by the construction of a new single-family residence.

In *Surfside Colony, Ltd. v. Calif. Coastal Comm.* (1991) 226 Cal.App.3d, 1260, 277 Cal.Rptr. 371 (modified, reh'g denied, Off. Rept. Cum. Sub. Hist. Table, Adv. Pamp. No. 10 (Feb. 14, 1991)), the nexus requirement as set forth in *Nollan* again overturned the Coastal Commission's attempt to impose a "condition of approval". Surfside Colony applied for an emergency permit to initiate erosion control measures. The Coastal Commission granted the permit upon the condition that Surfside Colony grant public beach access to its gated beach. The Court, following *Nollan*, concluded the Commission lacked "substantial evidence" upon which to impose its condition of approval, since there was no nexus between the erosion control project and public beach access. In reviewing the rule enunciated in *Nollan*, the Surfside Court observed:

> "The Court has thus concluded requiring relinquishment of the owner's right to exclude others from their private beach as a condition of the proposed construction amounted to virtual extortion. *See* 43 U.S. at page 837.
>
> * * *
>
> *"Nollan* requires a *'close connection' between the burden and the condition."*
>
> 226 Cal.App.3d, at ___, 277 Cal.Rptr. at 376. (Emphasis added.)

The burden is the claimed lost treatment capacity of the Truckee Marsh as a result of the original pre-1972 dragline and fill by the developer. The condition is the payment from post-1981 TKPOA members constructing

new homes of a mitigation fee to offset the pre-1972 burden. Insofar as both Resolutions require, as a condition of approval, new development proposals to offset the actual impacts resulting from the new development, the "close connection" requirement has been satisfied and TKPOA concedes a nexus has been established between the "burden and the condition". Insofar as the Resolutions require TKPOA's post-1981 builders of single-family residences to pay for pre-1972 impacts, TKPOA contends the condition "utterly fails" to establish a "close connection" "between the burden and the condition". *Nollan, supra,* 483 U.S. 387; *Logtin, supra,* pp. 134-135.

Distillation of the *Nollan* and *Surfside* nexus analysis may be phrased as a rhetorical question: "Is the condition fair?" TKPOA contends it is inherently unfair to isolate those owners that were not financially able or fortuitous enough to have constructed their home prior to 1982 to bear the entire burden for pre-1972 activities in which they did not participate. TKPOA does not believe either the U.S. Constitution nor the State Constitution permit a governmental entity to isolate a minority of owners within a development to pay for the claimed sins of the original developer, sins distant in time and unrelated to their individual development projects.[1]

---

[1] Lahontan claims the original dragline and fill created nutrient rich (nitrogen and phosphorus) waterways, promoting algae growth. TKPOA's data conflicts with Lahontan's. TKPOA submitted data at the May 5, 1991, hearing indicating its waterways contain lower levels of nutrients than Lake Tahoe. In any event, post 1981 builders do not contribute to the claimed problem and, therefore, should not be forced to finance mitigation that is not required by their activities.

CONCLUSION

Based on the foregoing points and authorities, TKPOA respectfully requests this Honorable Court grant Plaintiff's *ex parte* request for a Temporary Restraining Order and to issue its its [sic] Order to Show Cause why a preliminary injunction should not issue restraining and enjoining Defendants and Respondents from assessing and collecting a $4,000 per vacant lot Mitigation Fee, to stay the administrative proceedings, and to show cause why a preliminary injunction should not issue restraining and enjoining Defendants and Respondents from expending the approximately $1,500,000 collected since 1982.

DATED: July 9, 1991.

FELDMAN, SHAW & DeVORE
A Law Corporation

By: /s/ Deborah A. Palmer
Deborah A. Palmer
Lewis S. Feldman
Attorneys for Plaintiff
and Petitioner

Exhibit A

STATE OF CALIFORNIA PETE WILSON, Gov.
[SEAL]

CALIFORNIA REGIONAL WATER
QUALITY CONTROL BOARD
LAHONTAN REGION
2092 LAKE TAHOE BOULEVARD, SUITE 2
SOUTH LAKE TAHOE, CALIFORNIA 96150
(916) 544-3481 FAX (916) 544-2271

July 2, 1991

Tahoe Keys Property Owners Association
P.O. Box 13697
South Lake Tahoe, CA 95702-3697

Dear Association Members:

REQUEST FOR DOCUMENTATION OF INTEREST IN THE MITIGATION FUND PROPOSAL FOR THE POPE MARSH DEMONSTRATION PROJECT

Over the past few years, you have participated in meetings with us and staff from the United States Forest Service (USFS), Tahoe Regional Planning Agency (TRPA), California Resources Agency, El Dorado County and City of South Lake Tahoe, to discuss water quality projects that could be funded by the TKPOA mitigation fund.

In your December 16, 1988 letter (attached), you proposed nine projects which could provide water quality improvements. Project II includes the clarification and circulation of Tallac Lagoon, with the transfer of treated water to Pope Marsh. The agencies involved and your organization determined that a demonstration project

would be necessary before a full-scale project, like Project II, were implemented.

On April 19, 1991 the USFS sent us a demonstration project proposal (attached) requesting $39,800 to design a topographic map of Pope Marsh, measure plant species composition, conduct biomass analysis and perform water quality sampling and analysis of Pope Marsh and Tallac Lagoon, over a two year period. Phase I of the proposal will investigate the feasibility and environmental benefits (both water quality benefits and overall ecological benefits) of this project. If Phase I establishes that flooding is beneficial to the Marsh and the full-scale project is approved, the USFS requests that additional monitoring be done, as listed in Phase II, to ensure that the determination of Phase I holds true on the full-scale project.

Judging from your past participation in the project meetings, it is our understanding that you are still interested and will participate in the USFS mitigation fund proposal for the Pope Marsh Demonstration Project. Since we plan to bring this proposal to the attention of our Board at their July 11 and 12 meeting, we would like to request your immediate response. Please contact us, in writing, by ***July 10, 1991,*** regarding the status of your position on this project. Thank you for your cooperation.

Sincerely,

/s/ Robert Dodds for
HAROLD J. SINGER
EXECUTIVE OFFICER

Attachments

cc: Dave Ziegler, TRPA
Al Todd, USFS
Christine Sproul, Resources Agency
Dave Thompson, El Dorado County
Carol Drawbaugh, City of South Lake Tahoe
Dan Siegel, Attorney General's Office

CK/dm

Tahoe Keys
TAHOE KEYS PROPERTY OWNERS' ASSOCIATION

December 16 1988

O.S. Butterfield, Executive Officer
Lahontan Regional Water Quality Control Board
P.O. Box 9428
South Lake Tahoe, CA 95731-2428

RE: Tahoe Keys Mitigation Fund Project Proposal

Dear Mr. Butterfield:

The TKPOA Board of Directors is submitting proposed water quality projects, both on-site and off-site to provide water quality improvement through nutrient reduction in the drainage area which includes the Tahoe Keys.

We have three main points that we would like to present:

1. The Directors would like to propose the [sic] a trust fund be established to disperse the approximately $1,000,000 in the Mitigation Fund available at this time. The funds would be placed in a trust in order to earn approximately $100,000 annually, thus allowing these requested projects and others in the basin to be funded, maintained and monitored on a perpetual

basis. This annual revenue derived may even be tax exempt and could possibly generate matching funds.

2. We would like to propose the formation of a working committee composed of representatives of Lahontan, T.R.P.A., U.S. Forest Service, California Conservancy and Tahoe Keys. The committee would review and recommend a master plan and funding for implementation of Tahoe Keys Mitigation Fund Projects. The master plan would have to be a dynamic plan in that It should react to the results of monitoring programs which test the results of the incremental system improvements.

TAHOE KEYS PROPOSED WATER QUALITY PROJECTS WATER QUALITY MITIGATION FUND

PROJECT I: EAST LAGOON WATER CLARIFICATION

PURPOSE/BENEFITS: Divert water from East Lagoon in order to reduce the nutrient load in the East Lagoon and Lake Tallac (Lagoon).

Water pumped from Lake Tahoe, being of much higher quality and containing far less nutrients, is critically needed to provide flow through the East Lagoon and Lake Tallac (Lagoon) which because of its blockage to Lake Tahoe, its lack of a water circulation system and uncontrolled runoff of pollutants from Tahoe Valley storm drains, has become a [sic] increasingly contaminated.

The algae growth in the Tahoe Keys Lagoons, in a previous study by the Tahoe Research Group, indicated that algal growth was found to be over 20 times higher than growth in the near-shore waters of southern Lake Tahoe.

DESCRIPTION OF PROJECT: Water will be pumped directly from the East Sailing Lagoon to the Water Quality Plant to be treated and released to Lake Tallac. This project will require approximately 3400 feet pipe and will be installed via road crossing Venice Boulevard and Tahoe Keys Boulevard. This project will include where existing Tahoe Keys piping system lies on the corner of Venice Drive and Tahoe Keys Blvd.

ESTIMATED COST OF PROJECT: $380,000

COST BREAKDOWN: Install 18 inch pipe from East Cove Marina pump intertie at Venice Drive East running South to Dover Drive and than [sic] West across Tahoe Keys Boulevard to Tallac Lake.

Cost: $150,000

Continuing 18 inch pipe to plant about 2250 linear feet.

Cost: $230,000

PROJECT III: WATER QUALITY PLANT EQUIPMENT UPDATE

PURPOSE/BENEFITS: To provide for modifications or addition of units to existing water clarification plant equipment so that nutrients or algae can be removed from Lake Tallac (Lagoon) before water is discharged into Pope Marsh.

Lake Tallac (Lagoon) has never been tied to the Tahoe Keys Water Plant or its circulation system, so subsequently the U.S. Forest Service has major concerns to accept water from Lake Tallac (Lagoon) to Pope Marsh, to protect its wildlife, etc. Also, the 150 homeowners and their families bordering Lake Tallac (Lagoon) have been

guaranteed the same "Lake Tahoe Quality Water" as the other lagoons . . . (as corroborated by the Lahontan Water Quality Control Board meeting on September 8, 1988 and Dillingham Development/TKPOA Montgomery Engineering Report).

DESCRIPTION OF PROJECT: The existing Water Quality plant requires additional equipment or modifications to allow for removal of other nutrients or algal growth before water is discharged into Pope Marsh.

ESTIMATED COST OF PROJECT: Not available at this time

PROJECT IV: UPPER TRUCKEE RIVER DIVERSION TO LAKE TALLAC

PURPOSE/BENEFITS: To provide a "natural filtration" of the Upper Truckee River water by diversion to Pope Marsh into Tallac Lagoon. Having cleaner water at the onset from the Upper Truckee River, will further reduce the nutrients that have to be clarified and circulated through Lake Tallac. This will result in considerable savings in meeting the water quality standards imposed by the U.S. Forest Service when water flows into Pope Marsh from Lake Tallac (Lagoon).

DESCRIPTION OF PROJECT: A pumping/piping system would be established to accommodate river water to be fed into Lake Tallac. This river water could be piped directly to the Water Quality plant, if required, through direct pipe line valve interchange.

ESTIMATED COST OF PROJECT: Not available at present

PROJECT VII: EAST COVE REVETMENT

PURPOSE/BENEFITS: To reduce the erosion of steep embankments and the release of nutrient to the East Lagoon.

PROJECT DESCRIPTION: Install rock slope revetment protection along the eastern shoreline in East Lagoon area.

ESTIMATED COST OF PROJECT: $195,000

PROJECT VIII: LAKE TALLAC & LAGOON CLEAN-UP AND ROCK REVETMENT

PURPOSE/BENEFITS: To reduce the erosion of steep embankments and the release of nutrient to the Tallac Lagoon.

PROJECT DESCRIPTION: Clean Tallac Lagoon and install rock revetment slope protection on both sides and remove silt from bottom of lagoon.

ESTIMATED COST OF PROJECT: $290,000

PROJECT IX: DEEPENING TAHOE KEYS PUMP STATIONS

PURPOSE/BENEFITS: Lowering of the pumps will allow water clarification and circulation to continue in drought seasons.

PROJECT DESCRIPTION: Lower circulation pumps at the two pump stations.

ESTIMATED COST COST [sic] OF PROJECT: not available at this time

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Pope Marsh was originally a 1129 acre wetland called Rowlands Marsh and, later, the Upper Truckee Marsh, which was fed by the Upper Truckee River and Trout Creek. The marsh formed as a delta, often trapped by a barrier beach, on the south shore of Lake Tahoe. The Tahoe Keys was constructed by dredging and filling approximately 604 acres of of [sic] the original 1129 acres of marsh. This fill site bisected the marsh into the western (Pope Marsh) section, now under Forest Service management, and the eastern (Truckee Marsh) section (Map 1). The area under Forest Service management is approximately 300 acres.

The Tahoe Keys development essentially eliminated the Upper Truckee River and as a water source by re-routing the river to the east side of the Keys where now feeds only the Truckee Marsh. Pope Marsh is now primarily dependent on rain, snowmwelt [sic] from a smaller watershed dominated by the "Y" area of South Lake Tahoe, and percolation from Lake Tahoe, during high lake levels, to supp[sic] its incoming water.

Marsh Hydrology

Hydrologic characteristics, vegetation, soils, and microbial activity are the elements that determine a marsh's capacity to treat water. A wetland may act as a sink for chemical constituents, resulting in their net import to the

wetland and purification of the water. Conversely, it may act as a source, resulting in net export and an increase in the constituent load of the water. The wetland also may act as a transformer, changing the chemical forms of the constituents in the water, without significantly affecting the total loads.

Sedimentation, adsorption, and filtration are physical processes which result in capture of pollutants in wetlands. Subsequently, pollutants may be degraded, isolated, reintroduced into the water column, or concentrated. However, prolonged retention in the system generally is a prerequisite for reduction of the pollutant hazard potential. Retention time is affected by slope, flow characteristics, channelization, flood dispersal, substrate permeability, density of vegetation, and general roughness characteristics.

Marsh ecosystems vary according to fluctuating water levels. Short and long term water level fluctuations are very important for the life histories and functions of wetland plant species and, consequently, for the characteristics of the entire ecosystem. Primary production, species composition and nutrient cycling are among those most affected.

Marsh Vegetation

Nutrients tend to be rapidly consumed by wetland vegetation to support primary productivity. When the productivity:biomass ratio is high the wetland is more likely to incorporate large quantities of nutrients. When the productivity:biomass ratio is low, a situation commonly

found in mature systems, the ability to utilize nutrients is reduced.

The common range of plants in marsh ecosystems includes floating-leaf submergent plants whose roots are inundated with water, submergent vegetation.

Phase 1991 Flooding of Pope Marsh

Flood Pope Marsh by pumping water from the Tahoe Keys to Tallac Lagoon, and allow Tallac Lagoon to overflow into Pope Marsh (Map 2). Collect information necessary to evaluate the treatment capacity of Pope Marsh. Conduct the following analyses and actions:

A. Evaluate changes in biomass production and vegetative species composition. Monitor changes in species composition with aerial photography and ground based species sampling techniques. Determine current biomass production and evaluate changes after flooding.

Spring 1991 species composition and total biomass analysis. Cost $2,000.

Post flooding, Spring 1992, species composition and total biomass analysis. Cost $2,000.

Pre-flooding color aerial photography at 1:300. Cost $2,000.

B. Determine flow patterns and water levels in Pope Marsh. Construct a detailed topographic map of Pope Marsh. Cost $16,000.

C. Determine quality of water acceptable to Pope Marsh to maintain its health. Assure that quality of water in Tallac Lagoon is acceptable to Pope Marsh.

Carry out literature and expert review on the toxic levels of the water quality constituents measured in Pope Marsh with respect to their acceptable levels for flow into the marsh. Cost $1,050. (LTBMU currently financing this task).

D. Determine if Tallac lagoon water is acceptable to Pope Marsh.

Tallac Lagoon will be sampled at three locations, two depths at each location, once in the Spring of 1991 and once in the Summer of 1991. Samples will be analyzed for the constituents listed in Attachment A and Attachment B. Cost $4,800.

If constituent concentration levels are below those noted in Attachment A, the project will continue to Items E, and F or G.

If constituent concentration levels are above those noted in Attachment A, the project will be discontinued until arrangements can be made to mitigate the high concentration levels.

E. When the water level in the Pope Marsh Test Area is between six inches and twelve inches, or if the water level does not reach six inches from spring runoff, water will be pumped from the Tahoe Keys to Tallac Lagoon and overflow into the test area. The test area water level will be maintained at its maximum level until August 1, 1991. Cost of pumping (who will pay and how much?).

* * *

not reach six inches from spring runoff, water shall be pumped from the Tahoe Keys to Tallac Lagoon and overflow into the test area. The test area water level will be maintained at its maximum level until August 1 of each year. Cost of pumping (who will pay and how much?).

B. If nutrient constituent concentration levels (determined during Phase I) are below the levels noted in Attachment B, surface water in the test area will be sampled for constituent concentration levels. Samples will be taken at several locations within the test area at the same time of day on at least nine days during the time span of each test. Constituent influx through sub-surface flow is not of concern because the constituent loading to the marsh is low and biological activity within the near surface soils of the marsh will further reduce constituent concentration levels. Cost $45,000.

C. If nutrient constituent concentration levels (determined during Phase I) are above those noted in Attachment B, there will be a higher probability that constituents will be exported to Lake Tahoe via surface water or groundwater. The project will either be discontinued or more rigorous monitoring will be carried out to determine the marsh's capacity to assimilate constituents. Surface water sampling will describe diurnal fluctuations in constituent concentrations prior to overflow and at the beginning and end of each overflow period. Changes in surface water constituent concentrations will also be monitored by sampling several locations at the same time of the day on at least seven days during the time span of the overflow period. Groundwater will be sampled on a bi-monthly basis to assure the constituent concentrations of the surface water are being reduced before entering the sub-surface zone. Cost $70,000.

D. Evaluate changes in biomass production and vegetative species composition. Monitor changes in species composition with aerial photography and ground based species sampling techniques.

Annual species composition and total biomass analysis. Cost $6,000.

Bi-annual color aerial photography at 1:300. Cost $2,000.

Phase II Cost Summary

Annual species composition and biomass analysis	$6,000
Bi-annual aerial photography	$2,000
Sampling of Pope Marsh	$45,000
Pumping	??????
Total	$53,000
Optional sampling of Pope Marsh	$70,000

The following constituents are being sampled in Tallac Lagoon. Also presented are the acceptable levels for these constituents to allow flow into Pope Marsh.

Constituent	Acceptable Level
Sulfate	200 mg/1 (NPS, 1984)
Fluoride	1.5 mg/1 (NPS, 1984)
Chloride	100 mg/1 (NPS, 1984)
Aluminum	.25 mg/1 (NPS, 1984)
Arsenic	.19 mg/1 (FWS, 1990)
Barium	50 mg/1 (NPS, 1984)
Cadmium	0.002 mg/1 (NPS, 1984) **
Chromium	0.01 mg/1 (NPS, 1984) **
Copper	0.01 mg/1 (NPS, 1984) **
Iron	1.0 mg/1 (FWS, 1990)
Lead	0.025 mg/1 (NPS, 1984) **
Zinc	0.05 mg/1 (NPS, 1984) **
Manganese	0.5 mg/1 (NPS, 1984)

Vanadium	0.1 mg/1 (Hem, 1985)
Magnesium	150 mg/1 (NPS, 1984)
Sodium	1000 mg/1 (NPS, 1984)
Potassium	200 mg/1 (NPS, 1984)
Silica	100 mg/1 (NPS, 1984)
Benzene	5.3 mg/1 (FWS, 1990)
Specific Conductance	2000 micromhos (NPS, 1984)
pH	9.0 (NPS, 1984)
Alkalinity	Not less than 20 mg/1 (NPS, 1984)
Turbidity	3000 NTU (NPS, 1984)

APPENDIX K

STATE OF CALIFORNIA PETE WILSON GOVERNOR

CALIFORNIA REGIONAL WATER QUALITY
CONTROL BOARD –
LAHONTAN REGION
2092 LAKE TAHOE BOULEVARD, SUITE 2
SOUTH LAKE TAHOE, CALIFORNIA 96150
(916) 544-3481 FAX (916) 544-2271

July 2, 1991

TO ALL CONCERNED PERSONS AND AGENCIES:

LAHONTAN REGIONAL BOARD MEETING, JULY 11 AND 12, 1991 IN SOUTH LAKE TAHOE, CALIFORNIA

Enclosed for your information is a copy of the agenda announcement for the Regional Board Meeting. I have also enclosed a copy of agenda item 33 for your review.

If you need further information regarding this meeting, just give Cherie Kluck a call.

Sincerely,

/s/ Shirley Harada
Shirley Harada
Office Technician

Enclosures

CALIFORNIA REGIONAL WATER QUALITY
CONTROL BOARD
LAHONTAN REGION

MEETING AGENDA

TWO HUNDRED SEVENTY-SEVENTH REGULAR MEETING
July 11, and 12, 1991
South Lake Tahoe

City Council Chambers
1900 Lake Tahoe Boulevard
South Lake Tahoe, California

Note: A quorum of the Regional Board will be dining on Thursday, July 11, 1991, 5:30 p.m., at the Swiss Chalet, 2540 Highway 50, South Lake Tahoe, California.

REGULAR MEETING

July 11, 1991 – 1:00 – 5:00 p.m. and reconvene at 7:00 p.m. July 12, 1991 – 8:30 a.m.

The following items are numbered for identification purposes only and will not necessarily be considered in this order. All Board files, exhibits, and agenda material pertaining to items on the agenda are hereby made a part of the record for the appropriate item.

The Regional Board intends to consider items 1-30 and 37-44 on Thursday, July 11. All of the remaining items will be considered on Friday, July 12. If the Board is unable to consider any of the items for Thursday, the item(s) will be held over to Friday, July 12.

Thursday, July 11, 1991

Roll Call and Introductions

1. **PUBLIC FORUM**

   Any member of the public may address the Regional Board relating to any matter within the Board's jurisdiction. This need not be related to any item on the agenda and presentations should normally be limited to five minutes. No formal action by the Board will be taken on these matters.

2. **MINUTES**

   a. Minutes of the Two Hundred Seventy-Fifth Regular Meeting of May 9 and 10, 1991.

   b. Minutes of the Special Meeting of June 6, 1991.

   c. Minutes of the Two Hundred Seventy-Sixth Regular Meeting of June 13, 1991.

* * *

*13. Stampede Powerplant, U.S. Bureau of Reclamation, Sierra County (6-83-58); Pine Motel Annex/Oscar Grego, El Dorado County (6-75-26); Fremont Motel/Catera, Souza and Grazer, El Dorado County (6-75-105); Starlake Investments Office/Bldg/D.H. Kortes; El Dorado County (6-81-83); Taco Bell/William H. Mullin, El Dorado County (6-82-37); Third Street and South Avenue/City of South Lake Tahoe, El Dorado County (6-83-61); Tahoe Tyrol Subdivision/Tahoe Tyrol Homeowners Association, El Dorado County (6-85-65); Needle Peak Villas Condos/Needle Peak Villas Homeowners Association, El Dorado County (6-88-25); Flamingo Lodge/Roland Carlson, El Dorado County (6-88-49); City of South Lake Tahoe Public Works Department Storage Facility/City of South Lake Tahoe, El Dorado County (6-88-60); Grace Fellowship Church/The Intl.

Church of the Foursquare Gospel, El Dorado County (6-88-120); and Woods Warehouse/Norm and Ruth Woods, El Dorado County (6-88-123)

14. U-Stor-It Storage Facility, South Lake Tahoe, El Dorado County (6-88-47)

15. Brown Commercial Property, South Lake Tahoe, El Dorado County (6-83-75), and Larry Hatcher Real Estate Office, South Lake Tahoe, El Dorado County (6-83-69)

*16. Mammoth Sierra Inn Motel, Mono County (6-82-122)

*17. Crestview Four Lane Project, Mono County (6-87-042)

*18. Mammoth Lakes Highway 203 Improvement Project, Mono County (6-87-43)

ENFORCEMENT ACTIONS

19. CONTINUED PUBLIC HEARING – Consideration of a Proposed Cease and Desist Order for the City of Susanville for Discharges of Geothermal Wastes in Violation or Threatened Violation of Waste Discharge Requirements, Susanville, Lassen County (The Board will consider adoption of a Cease and Desist Order)

20. CONTINUED PUBLIC HEARING – Consideration of a Proposed Cease and Desist Order for Tsuji Nursery Geothermal Energy Project for Discharges of Geothermal Wastes in Violation or Threatened Violation of Waste Discharge Requirements, Susanville, Lassen County (The Board will consider adoption of a Cease and Desist Order)

21. CONTINUED PUBLIC HEARING – Consideration of Proposed Cease and Desist Order for the Church

of Jesus Christ of Latter-Day Saints (LDS) Susanville Ward Geothermal Energy Project for Discharges of Geothermal Wastes in Violation or Threatened Violation of Waste Discharge Requirements, Susanville, Lassen County (The Board will consider adoption of Cease and Desist Order)

22. PUBLIC HEARING – Consideration of Proposed Cease and Desist Order for Discharges or Threatened Discharges of Waste in Violation of Waste Discharge Requirements for the InyoKern Community Services District, Kern County (The Board will consider adoption of Cease and Desist Order)

* * *

OTHER BUSINESS

32. Consideration of Reclassification of Heap Leach Waste Ore for Closure, Sunshine Snow Cap Mine, Inyo County (The Board will be asked to reclassify the waste disposal site)

33. Discussion of Use of the Tahoe Keys Property Owners Mitigation Fees Fund for USFS Monitoring of Pope Marsh, El Dorado County (This is an information item only. No Board action will be taken)

34. Consideration of a Change in the Recently Approved Memorandum of Agreement (MOA) with the Sierra Army Depot, Herlong, Lassen County (The Board will be asked to approve the change in the MOA)

35. Lake Tahoe Basin Regulatory Strategy: Existing Facilities (The Board will be advised on staff's recommended priority list of facilities. This is a discussion item only, no Board action will be taken)

36. Discussion of Chemical Application Management Plan, Resort at Squaw Creek Golf Course, Placer

County (This is an information item only. No Board action will be taken)

37. Workshop on the National Pollutant Discharges Elimination System (NPDES) Program Regarding Geothermal Discharges. (This is an informational item only to provide background information on the Susanville area discharges. No Board action will be taken)

38. Workshop on Lake Tahoe Basin Stormwater Runoff NPDES Permits for the City of South Lake Tahoe, the County of El Dorado and the County of Placer (This is an information item only. No Board action will be taken)

39. Executive Officer's Report

--- Notification of Spills Pursuant to Section 13271, California Water Code and Section 25180.7, California Health and Safety Code

40. Chairman's Report

41. Board Member Forum

**CLOSED SESSION

42. Discussion of Litigation Filed by the Tahoe Keys Property Owner's Association Against the Regional Board, the State Board and the Resources Agency for Declaratory Relief and Writ of Mandate. El Dorado Superior Court Case No. SV91-0164. *Authority*: Government Code Section 11126(q)(1).

43. Discussion of Significant Exposure to Litigation. *Authority*: Government Code Section 11126(q)(2).

44. Discussion to Decide Whether to Initiate Litigation. *Authority*: Government Code Section 11126(q)(3).

California Regional Water Quality Control Board
Lahontan Region

BOARD INFORMATION SHEET

BOARD MEMBERS

Peggy Sartor, Chairwoman	Victorville
Eugene B. Nebeker, Ph.D., Vice Chairman	Lancaster
Richard A. Dodge, Ph.D.	Ridgecrest
Mark Lucksinger	So. Lake Tahoe
Juan Mijares	Barstow
I. G. "Leo" Poppoff	Brockway Springs
Dale Sare	El Dorado County
Helen Williams	Lassen County

STAFF

H. J. Singer, Executive Officer	2092 Lake Tahoe Blvd. Suite 2
R.S. Dodds, Assistant Executive Officer	South Lake Tahoe, CA 96150
	Telephone: (916) 544-3481
H. A. Baqai, Supervising Engineer	
K. J. Carter, Senior Engineer	
R. A. Eckstrom, Senior Engineer	
R. S. Gill, Environmental Specialist IV	1548 Civic Dr., Ste. 100 Victorville, CA 92392-2359
L. R. Applegate, Executive Assistant	Telephone: (619) 241-6583

RESTRICTIONS REGARDING CAMPAIGN CONTRIBUTIONS TO REGIONAL BOARD MEMBERS

All persons who actively support or oppose the adoption of waste discharge requirements or an NPDES permit pending before the Regional Board must submit a statement to the Board disclosing any contributions of $250 or

more to be used in any federal, state, or local election, made by the action supporter or opponent, or his or her agent, within the last 12 months to any Regional Board member.

Also, all permit applicants and all persons who actively support or oppose adoption of a set of waste discharge requirements or an NPDES permit pending before the Regional Board are prohibited from making a contribution of $250 or more to any board member for three months following a Regional Board decision on the permit application.

GENERAL STATEMENT

The primary duty of the Regional Board is to protect the quality of the waters within the Region for all beneficial uses. This duty is implemented by formulating and adopting water quality control plans for ground and surface waters and by prescribing and enforcing requirements on domestic and industrial waste discharges. Specific responsibilities and procedures of the Regional Water Quality Control Boards and the State Water Resources Control Board are outlined in the Porter-Cologne Water Quality Control Act.

The purpose of the meeting is for the Board to obtain testimony and information from concerned and affected parties and make decisions after considering the recommendations made by the Executive Officer.

The Board and the staff welcome information on pertinent problems, but comments at the meeting should be brief and directed to specifics of the case to enable the

Board to take appropriate action. Whenever possible, lengthy testimony should be presented to the Board in writing and only a summary of pertinent points presented verbally.

CALIFORNIA REGIONAL WATER QUALITY
CONTROL BOARD
LAHONTAN REGION

REVISED MEETING AGENDA

TWO HUNDRED SEVENTY-SEVENTH REGULAR MEETING
July 11, and 12, 1991
South Lake Tahoe

City Council Chambers
1900 Lake Tahoe Boulevard
South Lake Tahoe, California

PLEASE NOTE THE FOLLOWING REVISIONS TO THE PREVIOUSLY NOTICED AGENDA

Item 33 is revised to read:

33. Proposed Use of the Tahoe Keys Property Owners Mitigation Fund for the USFS Monitoring of Pope Marsh, El Dorado County (The Board will be asked to approve an expenditure from the fund)

Item 45 is added under "Other Business":

45. Federal Funding for the Tahoe Basin (The Board will be asked to adopt a resolution endorsing additions to the Clean Water Act that would provide grant

programs to address point and non-point sources of pollution at Tahoe Basin.)

CALIFORNIA REGIONAL WATER QUALITY
CONTROL BOARD
LAHONTAN REGION

MEETING OF JULY 11 AND 12, 1991
South Lake Tahoe

ITEM: 33

SUBJECT: TAHOE KEYS PROPERTY OWNERS ASSOCIATION (TKPOA) MITIGATION FUND PROPOSAL FOR THE POPE MARSH DEMONSTRATION PROJECT.

DISCUSSION:

On May 13, 1982, Regional Board adopted Resolution 82-8 (copy attached). This resolution designated a significant portion of the Tahoe Keys Development a man-modified stream environment zone thereby allowing additional development on the subdivided lots in the area. Resolution 82-8 required the payment of $4,000 per new lot developed to construct projects to partially mitigate the natural treatment capacity lost by the modification of the Truckee Marsh. The Regional Board determined that this mitigation could be accomplished by various onsite and offsite mitigation measures or offsets within the Tahoe Keys development or at other locations within the Lake Tahoe Basin. Approximately $1,500,000 has been collected since 1982. Resolution 82-8 requires Regional Board

approval of a project before funds can be spent.

HISTORY

The Tahoe Keys was constructed by dredging and filling approximately 604 acres of the original 1129 acres of marsh. This fill site bisected the marsh into the western section (Pope Marsh) under United States Forest Service (USFS) management, and the eastern section (Truckee Marsh). The Tahoe Keys development essentially eliminated the Upper Truckee River as a water source to Pope Marsh by re-routing the river to the east side of the Keys where it now feeds only the Truckee Marsh. Pope Marsh is now primarily dependent on rain, snowmelt from a smaller watershed dominated by the"Y" area of South Lake Tahoe, and high ground water due to high lake levels, to supply its water. In recent years Pope Marsh has been dry during the summer and fall months. As a result, water dependent plant species in Pope Marsh are declining and drought tolerant species are invading.

PROJECT

In a letter dated December 16, 1988 (attached) TKPOA proposed the Regional Board several water quality projects that could be funded by the mitigation fund. Project II includes the clarification and circulation of Tallac Lagoon, with the transfer of treated water to Pope Marsh. Over the past few years, Regional Board staff, TKPOA, Tahoe Regional Planning Agency (TRPA) staff, USFS staff, and the California Resources Agency have met informally,

to investigate the feasibility and environmental benefits (both water quality benefits and overall ecological benefits) of this project. This group has determined that additional monitoring is needed. The USFS is proposing a demonstration project to assess the feasibility and environmental impacts of TKPOA's proposed Project II. This work would provide the basis for the environmental document which must be completed before approval of a full-scale project. If the full-scale project is approved, the USFS proposes that additional monitoring be done. Attached is the USFS proposal for a two-phase monitoring plan, which can be summarized as follows:

Phase I: Demonstration Project Monitoring

Phase I (1991-1992) of the project includes construction of a contour map and two years of water quality sampling, and plant species composition and biomass analysis. This information is necessary to evaluate the treatment capacity of Pope Marsh and for the preparation of an environmental document. Cost of Phase I is $39,800.

Phase II: Full Project Monitoring

Phase II (1992-1994) includes annual plant species composition and biomass analysis, biannual aerial photography and water quality analysis, following project implementation. This information is needed to validate the results of Phase I monitoring and assesses long-term

trends and conditions. The Phase II monitoring is necessary to determine the impacts of the full scale project. Cost of Phase II is $53,000.

RECOMMENDATION:

That the Regional Board adopt the Proposed Resolution authorizing the expenditure of the TKPOA mitigation fund for the Phase I proposal by the USFS.

CK/sh

CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
LAHONTAN REGION

RESOLUTION NO. 6-91-(PROPOSED)
Consideration of Adoption of
Tahoe Keys Property Owners Association
(TKPOA) Mitigation Fund Proposal for the
Pope Marsh Demonstration Project

The California Regional Water Quality Control Board, Lahontan Region finds:

1. On May 13, 1982, Regional Board adopted Resolution 82-8. This resolution designated a significant portion of the Tahoe Keys Development a man-modified stream environment zone, thereby allowing additional development on the subdivided lots in the area.

2. Resolution 82-8 required the payment of $4,000 per new lot developed to construct projects to partially mitigate the natural

treatment capacity lost by the modification of the Truckee Marsh. The Regional Board determined that this mitigation could be accomplished by various onsite and offsite mitigation measures or offsets within the Tahoe Keys development or at other locations within the Lake Tahoe Basin. Approximately $1,500,000 has been collected since 1982. Resolution 82-8 requires Regional Board approval of a project before funds can be spent.

3. In a letter dated December 16, 1988, TKPOA proposed to the Regional Board several water quality projects that could be funded by the mitigation fund. Project II includes the clarification and circulation of Tallac Lagoon, with the transfer of treated water to Pope Marsh.

4. Regional Board staff, TKPOA, Tahoe Regional Planning Agency (TRPA), United States Forest Service (USFS) and the California Resources Agency have met informally to investigate the feasibility and environmental benefit of a project. It was agreed to carry out a demonstration project before a full-scale project was initiated.

5. On April 19, 1991, the USFS submitted a proposal of a monitoring program for a demonstration project which provides information on the feasibility and environmental benefit of flooding Pope Marsh with water from Tahoe Keys lagoons.

   Phase I (1991-1992) requires $39,800 for construction of a Pope Marsh contour map, and two years of data on water quality monitoring, plant species composition and biomass

analysis. This information is necessary to evaluate the treatment capacity of Pope Marsh.

Phase II (1992-1994) requires $53,000 to provide information needed to validate the results of Phase I monitoring and assess long-term trends and conditions.

6. Provision 10 of Resolution 82-8 states:

"That until a management and mitigation plan is submitted by the TKPOA and approved by the Regional Board, mitigation shall consist of payment of a fee of $4,000 for each lot which is developed. Payment shall be made to a mitigation fund established to accomplish the construction of projects within the Lake Tahoe basin to achieve a net reduction of nutrients equivalent to that generated by the Tahoe Keys development. The fund must be administered by a public entity or entities approved by the Executive Officer. Furthermore, the use of mitigation funds for the implementation of specific projects shall require the approval of the Executive Officer. The Executive Officer is authorized to enter into such agreements as may be required to ensure the proper administration of the mitigation fund. Payment of such mitigation fee shall precede any development on each lot . . . "

7. This demonstration project is categorically exempt from the requirement of California Environmental Quality Act (CEQA) to prepare an environmental impact report or negative declaration. This exemption is described in section 15304 (d), Title 14, Article 19, California Code of Regulations.

This includes projects which have " . . . minor public or private alterations in the condition of land, water, and/or vegetation which do not involve removal of mature, scenic trees except for forestry and agricultural purposes. Examples include but are not limited to:

. . . (d) Minor alterations in land, water, and vegetation on existing officially designated wildlife management areas or fish production facilities which result in improvement of habitat for fish and wildlife resources or greater fish production."

8. Regional Board, in a public meeting, has heard and considered all comments pertaining to this matter.

THEREFORE, BE IT RESOLVED THAT:

1. The Regional Board approves expenditure of up to $45,000 from the fund described in Finding No. 6 to the United States Forest Service for Phase I monitoring of the Pope Marsh Demonstration Project.

2. The approval of this Resolution does not indicate the Regional Board's intent to approve funding for the full project.

3. The Regional Board encourages the California Resources Agency to approve use of the TKPOA mitigation fund for this demonstration project.

4. The Regional Board directs the Executive Officer to approve of billings and enter into any agreements pursuant to Provision 10 of Resolution 82-8.

I, Harold J. Singer, Executive Officer, do hereby certify that the foregoing is a full, true, and correct copy of a Resolution adopted by the California Regional Water Quality Control Board, Lahontan Region, on July 12, 1991.

_____

HAROLD J. SINGER
EXECUTIVE OFFICER

APPENDIX L

July 3, 1991

VIA FACSIMILE

Daniel L. Siegel, Deputy Attorney General
State of California, Department of Justice
1515 K Street, Suite 511
P.O. Box 944255
Sacramento, CA 94244-2550

Re: TKPOA v. State Water Resources Control Board, et al. Case No. SV91-0163

Dear Mr. Siegel:

Mr. Singer's letter to the Tahoe Keys Property Owners' Association ("TKPOA") dated July 2, 1991, concerning the imminent expenditure of TKPOA Mitigation Funds has been referred to the undersigned for reply. Since TKPOA has filed suit against Lahontan concerning the disposition of these funds, all future Lahontan correspondence, including Lahontan Agendas addressing the Mitigation Fund, should be directed to the undersigned.

It is interesting to note TKPOA received notice of the intended expenditure at 4:45 p.m. on July 2, 1991. Mr. Singer's letter requests a response by July 10, 1991, allowing TKPOA only five working days to reply or seek injunctive relief. It is particularly interesting the foregoing occurred after the June 20, 1991, court hearing wherein you represented to the Court that your client did not have any immediate plans to invade the Mitigation Fund. I have no reason to believe you knew otherwise, however, it is indeed curious to observe how fast government can act when sufficiently motivated. In any event,

had the Court been informed that Lahontan staff was asking its Board to release $39,800 of Mitigation Funds in 20 days, after absolutely no money has been spent during the past nine plus years, the Court may very well have ruled otherwise.

We simply do not understand why, after nine years of inactivity, Lahontan seeks to invade the Mitigation Fund within days of TKPOA's filing of a lawsuit asking the Court to declare the rights of the parties. Would not all parties be better off seeking a prompt judicial determination rather than resorting to self help?

Please be advised TKPOA has no interest in participating in the flooding of Pope Marsh so long as the Mitigation Funds are allocated thereto. Accordingly, it is TKPOA's position that this project will not and cannot proceed as outlined in your client's July 2, 1991, letter. Since TKPOA will not flood Pope Marsh under the terms outlined, TKPOA objects to the allocation, award, or expenditure of any of the Mitigation Funds more particularly described in *TKPOA v. Lahontan, et al.* Be further advised TKPOA has withdrawn all proposals for expenditure of the Mitigation Funds, including, but not limited to, the proposals enumerated in TKPOA's letter dated December 16, 1988, to the Regional Board, for the reasons set forth in the above-described action.

Based on the foregoing, it appears to the undersigned the requested action is moot and, therefore, the Lahontan Board will not consider the request to allocate Mitigation Funds for Phase One of the U.S. Forest Service Demonstration Project proposal. If it is your client's position that Lahontan staff will nonetheless request its Board to

authorize the expenditure, notwithstanding the fact that studies cannot occur without TKPOA's flooding of the Marsh, please advise so that TKPOA may request the Superior Court to restrain the action.

TKPOA, in cooperation with the U.S. Forest Service, has previously flooded Pope Marsh, and TKPOA is willing to resume the flooding of Pope Marsh. My client is prepared to do so at its own expense. Further, TKPOA will bear the expenses associated with water quality monitoring within Tallac Lagoon. TKPOA is not willing to flood Pope Marsh if it results in Lahontan spending the contested Mitigation Funds. Consequently, TKPOA has suspended all efforts to raise the level of the Tallac Lagoon to flood Pope Marsh, and will not resume such efforts until such time as the parties agree the flooding may occur without any expenditure of the Mitigation Funds.

Due to the short notice received and the holiday week, I would very much appreciate your immediate reply.

Sincerely,

FELDMAN, SHAW & DeVORE
A Law Corporation

By:
Lewis S. Feldman

LSF/jps

cc: Tahoe Keys Property Owners' Association

APPENDIX M

February 15, 1991

Harold Singer, Executive Officer
State Water Resources Control
Board – Lahontan Region
P.O. Box 9428
South Lake Tahoe, CA 95731-2428

Dave Zieglar, Executive Director
Tahoe Regional Planning Agency
P.O. Box 1038
Zephyr Cove, NV 89448

Re: Tahoe Keys Water Quality Mitigation Fund

Gentlemen:

Please be advised this office is counsel to the Tahoe Keys Property Owners' Association, a non-profit mutual benefit corporation ("TKPOA"), representing the property owners residing within the area generally known as Tahoe Keys, South Lake Tahoe, California. For the reasons set forth below, TKPOA demands the immediate cessation of the imposition of water quality mitigation fees pursuant to CTRPA Ordinance 82-10 and Lahontan Board Resolution 82-8, and the return of all funds collected thereunder.

In 1982, the Tahoe Regional Planning Agency ("TRPA") re-classified the Tahoe Keys as a man-modified environment. Previously, the area had been classified as a stream environment zone. The California Tahoe Regional Planning Agency ("CTRPA"), however, maintained concurrent jurisdiction with TRPA and refused to re-classify the area "man-modified" until it adopted Ordinance 82-10,

authorizing the imposition of a "mitigation fee" to remedy, in part, the naturally occurring water quality benefits lost by reason of the original dredge and fill of the Truckee Marsh.

The adoption of CTRPA Ordinance 82-10, as well as Lahontan Resolution No. 82-8, followed the publication of a study by the Tahoe Research Group ("TRG") dated February 24, 1982. The TRG study concluded that high levels of nitrogen continued to be released after decomposed organic material was compacted to form the Keys. A supplemental study by Phillip Williams and Associates ("Williams") postulated the resulting nutrient rich waters of Tahoe Keys interchanged with the more sterile waters of the Lake as a consequence of a temperature differential between the Keys and the Lake. TKPOA disputed the findings of both studies. It is noteworthy water quality sampling conducted during the intervening years contradicts the findings of both the Williams and TRG studies. Nonetheless, since 1982, owners of unimproved parcels within the Tahoe Keys have paid the "mitigation fee" calculated, at least in part, on the disputed studies. It is undisputed, however, the cornerstone of the mitigation fee was the conclusion that the original development (the dredge and fill of the Truckee Marsh) caused the release of nutrients into the Keys' lagoons, and not the subsequent construction of single-family residences on unimproved lots. In other words, CTRPA and Lahontan reasoned that new construction (post 1981) within Tahoe Keys had to pay for the consequences of the original 1960s dredge and fill. TKPOA has consistently questioned the fairness of compelling owners of undeveloped lots to pay for harm they did not cause.

Since 1982, approximately $1,500,000 has been collected as "mitigation fees", none of which has been expended for any water quality improvement purpose. As we understand it, Lahontan and TRPA maintain the funds collected may not be spent to "directly benefit water quality exclusively within Tahoe Keys" but, rather, must be spent in such a way that Tahoe Keys may benefit from a project or projects, as well as surrounding areas. While TKPOA has always opposed this position, the issue is moot since the collection of the fee or any expenditure of the funds collected is violative of state and federal law.

In *Nollan v. The California Coastal Commission* (1987), 43 U.S. 825, 107 S.Ct. 3141, 97 Law at 677, the United States Supreme Court was confronted with an analagous [sic] situation. The Nollans applied for a permit to replace their beachfront bungalow with a new three-bedroom residence. The California Coastal Commission approved the permit, conditioned upon the Nollans grant of a lateral public easement. The Supreme Court held the condition imposed was not "reasonably related" to the consequence of the proposed development. *Id.* at 3148. The Court declared the condition of approval a constitutionally impermissible exaction. It is noteworthy that while the *Nollan* Court concluded the lateral public easement to the beach constituted a legitimate public interest, it nonetheless held the extraction from the Nollans thereof "utterly fails" to respond to the consequence of the development. In other words, the nexus between the proposed condition and the consequence of the proposed development had not been established. *Id.* 3148-3149. The court held the Coastal Commission abused its discretion by conditioning approval of the new development on the

grant of a lateral access easement by the Nollans. While the proposed easement may have very well been desirable from the public's perspective, a sufficient relationship between the proposed condition and the consequence of the new development had not been established. The Nollans were relieved of the grant of easement since the required nexus did not exist.

Nollan made clear the condition imposed must address the impact caused. *See, Logtin's* California Land Use, § 8222[2], 2d. Supp. 1990, at p. 136. The CTRPA and Lahontan record make abundantly clear the condition imposed, a water quality mitigation fee, was assessed to address the impacts of the original development of the Keys and its waterways, *not* the actual impact of the subsequent construction of new private residences. CTRPA's Ordinance 82-10 recites this fact in its preamble:

> . . . this study [TRG] concludes that further development on subdivided land within the Tahoe Keys development *will not exacerbate water quality problems created by alteration of the stream zone provided appropriate mitigation is included with development proposals*. . . .
>
> WHEREAS, partial mitigation of the natural treatment capacity, lost by the modification of the Truckee Marsh, can be accompanied by various onsite and offsite mitigation measures within Tahoe Keys Development, or at other locations within the Lake Tahoe Basin;
>
> WHEREAS, the construction and continuing . . . operations *of the now existing . . . lagoons and peninsulas contribute significant quantities of nutrients to the water of Lake Tahoe.* (Emphasis added.)

Lahontan Resolution No. 82-8 contains similar findings:

> Further development on subdivided land within the Tahoe Keys development under the jurisdiction of the TKPOA, if suitably mitigated, will not exacerbate water quality problems created by alteration of the stream environemnt [sic] zone; and
>
> * * *
>
> A mitigation fee of $4000 per vacant lot to be developed within the TKPOA portion of the Tahoe Keys development has been determined by the Regional Board staff . . . to be sufficient to insure adequate implementation of the mitigation measures required. . . .
>
> * * *
>
> Payment of such mitigation fee shall precede any development on each lot.

As stated in both the Ordinance and the Resolution, the fee is assessed to rectify the effects of past development, not new construction. New owners are called upon to pay for the impacts of the original development. The Ordinance and Resolution recognize that the construction of new residences "will not exacerbate water quality problems created by alteration of the stream zone" if "appropriate mitigation is included with development proposals." A legitimate condition of approval is the requirement that new construction utilize best management practices, whereas imposing a monetary fee to offset consequences of the original development does not meet constitutional requirements.

In *Surfside Colony, Ltd. v. California Coastal Commission*, 91 Daily Journal DAR 767 (Jan. 15, 1991), the California

Court of Appeal overturned the California Coastal Commission's attempt to impose a "condition of approval" upon Surfside's application for a permit to undertake emergency erosion control repair. The Coastal Commission sought to condition the requested permit upon Surfside's grant of public beach access to its gated beach. The court, following *Nollan*, concluded the Commission lacked "substantial evidence" upon which to impose its condition of approval, since there was no nexus between the erosion control project and public beach access. In reviewing the rule enunciated in *Nollan*, the *Surfside* court observed:

> "The Court thus concluded requiring relinquishment of the owners' right to exclude others from their private beach as a condition of the proposed construction amounted to virtual extortion. (*See* 483 U.S., at p. 837.)
>
> * * *
>
> " . . . *Nollan* requires a 'close connection' between the burden and the condition."
>
> *Id.*, at pp. 768, 769.

Likewise, there is no nexus between the mitigation fee imposed to offset the treatment capacity lost by modification of the Truckee Marsh and the consequence of constructing a new residence within Tahoe Keys. Owners have suffered the exaction because of "virtual extortion", an inability to otherwise build upon their lots. To hold new construction responsible for the claimed detriment caused by Dillingham over 20 years ago fails to meet the nexus test and is therefore constitutionally impermissible.

In 1982, a Memorandum of Understanding ("MOU") was prepared for signature by TKPOA, CTRPA and Lahontan. All parties failed to execute the MOU. This document dealt with the collection of the mitigation fees which, under *Nollan*, are unconstitutional since the required "nexus" is clearly lacking. Please be advised TKPOA maintains the 1982 MOU is void. (Civil Code Section 3412.)

It is evident the mitigation fee was imposed to compensate for the "natural treatment capacity, lost by the modification of the Truckee Marsh" and not to mitigate the actual impacts resulting from the construction of new single-family residences, impacts which are mitigated with the individual "development proposals". No nexus has been established between the water quality mitigation fee and new development. On the contrary, absolutely no lawful justification exists for the imposition of a special Tahoe Keys' surcharge. Accordingly, TKPOA demands the immediate cessation of the water quality mitigation surcharge and return of all water quality mitigation funds collected from TKPOA owners forthwith.

The foregoing should not be construed as evidence of any unwillingness by TKPOA to participate in water quality projects that have a direct benefit within Tahoe Keys. TKPOA looks forward to the implementation of the Pope Marsh flooding project and will continue to cooperate with the interested agencies to implement the project. TKPOA is concerned about water quality at Lake Tahoe, and looks forward to addressing issues of mutual concern. Imposition of the water quality mitigation fee, however, is unfair to owners of unimproved lots and, after nine years, has generated nothing but passbook interest.

We hereby request this matter be placed on the next agenda. We respectfully request your honorable Boards direct cessation of the unlawful surcharge and return of the mitigation fees collected, together with accrued interest. Please contact me if you have any questions concerning the foregoing.

Sincerely,

FELDMAN, SHAW & DeVORE
A Law Corporation

By:
Lewis S. Feldman

LSF/jps

cc: California State Resources Agency
Attn: Chris Sproul
Tahoe Keys Property Owners' Association

APPENDIX N

CALIFORNIA REGIONAL WATER
QUALITY CONTROL BOARD
LAHONTAN REGION

RESOLUTION NO. 6-91-47

Denying Tahoe Keys Property Owners
Association's Request for Return of the
Mitigation Fund and Cessation of Fees

The California Regional Water Quality Control Board, Lahontan Region finds:

1. On May 13, 1982, Regional Board adopted Resolution 82-8, recognizing the development of Tahoe Keys in the Truckee Marsh and the natural treatment capacity lost by conversion of the original stream environment zone.

2. Tahoe Keys Property Owners Association (TKPOA) was to submit to the Regional Board, a management and mitigation plan describing mitigation measures which would be implemented for the life and build-out of the Tahoe Keys development.

3. Payment was to be made to a mitigation fund established to construct projects within the Lake Tahoe Basin to achieve a net reduction of nutrients equivalent to that generated by the Tahoe Keys development.

4. In a letter to Harold Singer, dated February 15, 1991, TKPOA, represented by attorney Lewis S. Feldman, demanded immediate cessation of mitigation fees and return of all funds collected.

THEREFORE, BE IT RESOLVED THAT:

1. Return of the mitigation fund and cessation of fees to TKPOA be denied.

I, Harold J. Singer, Executive Officer, do hereby certify that the foregoing is a full, true, and correct copy of a Resolution adopted by the California Regional Water Quality Control Board, Lahontan Region, on May 9, 1991.

Ordered By: /s/ Harold J. Singer
HAROLD J. SINGER
EXECUTIVE OFFICER

APPENDIX O

FELDMAN, SHAW & DeVORE, A LAW CORPORATION
Lewis S. Feldman, State Bar No. 68877
Deborah A. Palmer, State Bar No. 129192
2311 Lake Tahoe Boulevard, Suite 1
South Lake Tahoe, California 96150
Telephone: (916) 544-3731
Facsimile: (916) 541-5142

Attorneys for Plaintiff and Petitioner
TAHOE KEYS PROPERTY OWNERS' ASSOCIATION

IN THE SUPERIOR COURT OF
THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF EL DORADO

TAHOE KEYS PROPERTY OWNERS' ASSOCIATION, a non-profit mutual benefit corporation, Plaintiff and Petitioner, vs. STATE WATER RESOURCES CONTROL BOARD; STATE OF CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD – LAHONTAN REGION; STATE OF CALIFORNIA RESOURCES AGENCY, and DOES 1 through 25, inclusive, Defendants and Respondents.	CASE NO. SV91-0164 PETITIONER TAHOE KEYS PROPERTY OWNERS' ASSOCIATION'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PRELIMINARY INJUNCTION DATE: AUGUST 5, 1991 TIME: 10:00 A.M. DEPT: Not Assigned JUDGE: The Hon. Patrick J. Reilly (Filed Jul. 24, 1991)

Petitioner TAHOE KEYS PROPERTY OWNERS' ASSOCIATION ("TKPOA") is seeking an Order enjoining Defendants STATE WATER RESOURCES CONTROL BOARD and its Regional Board ("Lahontan") and the STATE OF CALIFORNIA RESOURCES AGENCY ("Resources Agency") from expending money from the Tahoe Keys Mitigation Fund and from collecting fees from its members for deposit into the Tahoe Keys Mitigation Fund pending a trial on the merits. TKPOA'S Petition is based on the fact the Mitigation Fund is violative of the Fifth Amendment rights of TKPOA's members, has been assessed under conflicting regulations, and that after nine years of inactivity, Defendants' response to TKPOA's request for a declaration of rights is to seek to expend the funds immediately. (*See* Declaration of Deborah A. Palmer filed herewith.)

A. Grounds For Issuance

An injunction may be granted:

> "1. When it appears by the complaint that the plaintiff is entitled to the relief demanded, and such relief, or any part thereof, consists in restraining the commission or continuance of the act complained of, either for a limited period or perpetually;
>
> "2. When it appears by the complaint or affidavits that the commission or continuance of some act during the litigation would produce waste, or great and irreparable injury, to a party to the action;
>
> "3. When it appears, during the litigation that a party to the action is doing, or threatens, or is about to do, or is procuring or suffering to

be done, some act in violation of the rights of another party to the action respecting the subject of the action and tending to render the judgment ineffectual;

"4. When pecuniary compensation would not afford adequate relief;

"5. Where it would be extremely difficult to ascertain the amount of compensation which would afford adequate relief;

"6. Where the restraint is necessary to prevent a multiplicity of judicial proceedings;

"7. Where the obligation arises from a trust." (Code of Civil Procedure, Section 526.)

All seven items are satisfied in this proceeding.

B. Violation of a Constitutional Right Is Irreparable Injury Notwithstanding the Availability of Money Damages

Irreparable injury is presumed by TKPOA's verified Complaint and Declarations on file alleging a violation of its 1590 members' constitutional rights pursuant to the Federal and State Constitutions. (Complaint, at pp. 8-11.) "[I]t is a legal common place that injunctive relief is available when constitutional rights are being violated, regardless of a damages remedy at law. . . . The very purpose of the preliminary injunction is to prevent the irreparable loss of rights before judgment." (*Nat. Org. for Reform of Marijuana Laws v. Mullen* (D.C. Cal. 1985) 608 F.Supp. 945, 962 (remanded on other issue, 796 (9th Cir. 1986) 796 F.2d 276; accord 11 Wright & Miller, *Federal Practice and Procedure* (1973) §2948, at p. 440, (updated 1991) ("When an alleged deprivation of constitutional

right is involved, most courts hold that no further showing of irreparable injury is necessary.); *Citicorp Services, Inc. v. Gillespie* (N.D. Cal. 1989) 712 F.Supp. 749, 753 ("courts in the Ninth Circuit have presumed irreparable harm from an alleged violation of constitutional rights.") Thus, TKPOA is entitled to injunctive relief on the basis of irreparable harm. Moreover, as set forth below, TKPOA has a reasonable likelihood of prevailing on the merits, notwithstanding any remedy at law.

C. TKPOA Has a Reasonable Probability of Prevailing on the Merits

The evidence before the Court reveals TKPOA's members' constitutional rights to due process, equal protection and from the taking of its property without a constitutionally permitted nexus as provided in *Nollan v. The California Coastal Commission* (1987) 43 U.S. 825, 107 S.Ct. 3141, 97 L.Ed.2d 677 have been violated. (*See* Points and Authorities in Support of Temporary Restraining Order re: Constitutional arguments, incorporated herein as if set forth at length.) The Court need not determine that TKPOA shall prevail on the merits at trial to grant the Petition for Preliminary Injunction, but only that TKPOA has a reasonable probability of prevailing on the merits. (*See Robbins v. Super. Ct. (County of Sacramento)* (1985) 38 Ca1.3d 199, 206, 211 Cal.Rptr. 398, 401.) For the reasons set forth in TKPOA's Memorandum of Points and Authorities submitted in connection with its application for a temporary restraining order, TKPOA maintains the $4,000 Mitigation Fee constitutes an unconstitutional exaction. In any event, an actual conflict exists between

the two governmental regulations, necessitating a declaration of rights. Clearly, at the very least, the proceeds of the exaction should not be dissipated prior to the Court declaring the rights of the parties under the conflicting Resolutions.

The Resolutions at issue here, CTRPA Resolution 82-8 and Lahontan Resolution 82-10, provide that a mitigation fee shall be paid by TKPOA members prior to their construction of a single family dwelling on their property. (*See* Resolutions attached to Complaint as Exhibits B and D.) TKPOA members cannot obtain a building permit for construction of their homes without paying the fee. (*See* Declaration of Gregory Bennallack.) The fee allegedly is to mitigate impacts of construction caused by the developer of Tahoe Keys, not impacts of construction caused by TKPOA's members. (*Ibid.*) The undisputed evidence is that TKPOA's members mitigate impacts caused by the members' construction just as all property owners constructing new homes do in Lake Tahoe, however, *only* TKPOA members are singled out to pay additional mitigation fees for the developer's past conduct. There is absolutely no nexus between the fees charged and the impacts of development by TKPOA members that would warrant the unequal treatment of TKPOA members, a fundamental violation of their constitutional rights to both due process and equal protection.

D. Defendants Should Be Restrained from Expending the Funds Collected and from Collecting Additional Funds Pending Resolution by the Court

To date, Defendants have collected approximately $1.5 million from TKPOA members and deposited it into the Tahoe Keys Mitigation Fund. No expenditures have been made from the fund in the past nine years. Defendant Lahontan now proposes to spend the funds, and TKPOA petitions that expenditures be restrained pending a judicial declaration of rights. The dissipation of the trust corpus prior to declaratory relief creates problems where none exist. Protecting the trust corpus minimizes the risk of harm to both parties. If TKPOA prevails, Defendants will not be required to return funds already spent, and TKPOA will not have to seek satisfaction of a judgment against the State for funds improperly collected and expended. Likewise, if Defendants prevail, the funds will be spent in accordance with the Court's direction, and Defendants will not run the risk of dissipating the trust under the wrong resolution.

E. Waiver and Estoppel

Defendants have not placed before the Court any authority justifying its denial to TKPOA's members of building permits absent payment of the Mitigation Fee. Moreover, the two resolutions imposed by two different governmental agencies attempt to collect the same funds, for different methods of expenditure. No authority for either agency to impose this fee has been presented.

It is noteworthy a Memorandum of Understanding intended to resolve the differences in interpretation

between TKPOA, Lahontan and CTRPA was never executed. (Complaint, at Exhibit C.) TKPOA has not waived nor is TKPOA estopped from raising the foregoing issues because the issue of authority and the lack of an agreement have never been resolved. TKPOA members are clearly under duress to pay the fee required by two governmental agencies in order to build their homes. TKPOA's members remain under duress to date. Waiver is the intentional, *voluntary*, relinquishment of a known right and no waiver can be extracted by fear, coercion or threats. (*In Re H.* (1970) 2 Cal.3d 513, 86 Cal.Rptr. 76.)

In addition, it well established that "waiver of constitutional rights is not presumed . . . courts indulge every reasonable presumption against waiver of fundamental constitutional rights. (*Isbell v. County of Sonoma* (1978) 21 Cal.3d 61, 145 Cal.Rptr. 368.) Moreover, a statute that violates either constitution is void to that extent and a void act is inoperative as though it never had been passed. (*Cummings v. Morez* (1974) 42 Cal.App.3d 66, 116 Cal.Rptr. 586.) A void instrument may be brought before the court upon application at any time. (Civil Code §3412.) Based on the past and proposed exaction of the Mitigation Fee from TKPOA members and the proposed expenditure of the funds under resolutions that will irreparably damage TKPOA members, no waiver or estoppel exists.

Defendants' reliance on *Rossco Holdings, Inc. v. State of California* (1989) 212 Cal.App.3d 642 for the proposition that TKPOA members waived their rights to challenge the resolutions by building under the permits is misplaced. In *Rossco*, a developer attempted to develop a

large parcel of land and the California Coastal Commission imposed various conditions on the development. (*Id.*, at p. 647.) The developer sued claiming his parcel was outside the Coastal Commission's jurisdiction and that the conditions were improper. (*Ibid.*) The Appellate Court held a waiver had occurred by the landowner complying with the permit and then contesting it. "A landowner cannot challenge a condition imposed upon the granting of a permit after acquiescence in the condition by either specifically agreeing to the condition or failing to challenge its validity, and accepting the benefits afforded by the permit." (*Id.*, at 655.) Here, TKPOA's members never did "acquiesce" to the condition of payment, a Memorandum of Understanding was never signed, and the trust funds have not been spent. (Complaint, Exhibit C.) Moreover, TKPOA is challenging the validity of the collection itself, not a condition upon the granting of a permit.

CONCLUSION

The seven components for the issuance of a [sic] injunction under C.C.P. §526 have been satisfied by TKPOA herein: (1) TKPOA is unequivocally entitled to a declaration of rights; (2) the State's threat to expend trust funds in advance of declaratory relief may very well "produce waste, or great irreparable injury"; (3) the State's threat to expend the funds and its continued collection constitute an "act in violation of the rights of another"; (4) money damages will not cure violation of TKPOA's members' rights under the Fifth and Fourteenth

Amendments; (5) compensation for the violation of constitutional rights "would be extremely difficult to ascertain"; (6) the restraint will prevent "a multiplicity of proceedings"; and (7) "the obligation arises from a trust."

Accordingly, TKPOA respectfully requests this Honorable Court enter its Order enjoining Defendants from invading the Tahoe Keys Mitigation Fund. In addition, TKPOA respectfully requests this Honorable Court restrain Defendants from further collection of the Mitigation Fee pending trial on the merits. While TKPOA and its members are suffering irreparable harm by the continued violation of their constitutional rights, Defendants will suffer no prejudice by Petitioner's request.

Dated: July 24, 1991.

FELDMAN, SHAW & DeVORE
A Law Corporation

By: /s/ Lewis S. Feldman
Lewis S. Feldman
Attorneys for Petitioner

PROOF OF SERVICE
1013A (3) CCP Revised 5/1/88

STATE OF CALIFORNIA, COUNTY OF EL DORADO

I am employed in the county of El Dorado, State of California. I am over the age of 18 and not a party to the within action; my business address is: 2311 Lake Tahoe Blvd., Suite 1, South Lake Tahoe, CA 96150

On 7/24, 1991, I served the foregoing document described as PETITIONER TAHOE KEYS PROPERTY OWNERS' ASSOCIATION'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PRELIMINARY INJUNCTION on the interested parties in this action

[ ] by placing the true copies thereof enclosed in sealed envelopes addressed as stated on the attached mailing list:

[X] by placing [ ] the original [X] a true copy thereof enclosed in sealed envelopes addressed as follows:

DANIEL L. SIEGEL, Deputy Attorney General
State of California
1515 K Street, Suite 511
P.O. Box 944255
Sacramento, CA 94244-2550
** VIA FACSIMILE & U.S. MAIL **

[X] BY MAIL

[ ] *I deposited such envelope in the mail at _____, California. The envelope was mailed with postage thereon fully prepaid.

[X] As follows: I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with U.S. postal service on that same day with postage thereon fully prepaid at South Lake Tahoe California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

Executed on July 24, 1991, at South Lake Tahoe, California.

[ ] ** (BY PERSONAL SERVICE) I delivered such envelope by hand to the offices of the addressee.

Executed on _____, 19___, at _____, California.

[X] (State) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

[ ] (Federal) I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Juliette P. Snyder
Type or Print Name

/s/ Juliette P. Snyder
Signature

APPENDIX P

IN THE SUPERIOR COURT OF
THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF ELDORADO

TAHOE KEYS PROPERTY OWNERS' ASSOCIATION, a nonprofit mutual benefit corporation,	:	CASE NO. SV91-0164
Plaintiff and petitioner,	:	
vs.	:	
STATE WATER RESOURCES CONTROL BOARD, et al.,	:	
Defendants and respondents.	:	

DEPOSITION OF
HAROLD SINGER

July 31, 1991

South Lake Tahoe, California

SUNSHINE REPORTING SERVICES
883-7950 OR 323-3411

REPORTED BY: JACQUELINE ADAMS, CA CSR #7455;
NV CSR #278

COMPUTER-ASSISTED TRANSCRIPTION BY:
STENOGRAPH-OMNICAT

APPEARANCES

FOR THE PLAINTIFF: FELDMAN, SHAW & DeVORE
By: LEWIS S. FELDMAN
2311 Lake Tahoe Boulevard, Ste. 1
South Lake Tahoe, California 96150

FOR THE DEFENDANTS: STATE OF CALIFORNIA DEPT. OF JUSTICE
By: DANIEL L. SIEGEL
1515 K Street
P.O. Box 944255
Sacramento, California 94244-2550

PRESENT TEMPORARILY:CHERIE KLUCK

* * *

[p. 44] A No, I do not.

Q As we sit here today, do you know how much money has been collected?

A My understanding is – and it is somewhat indirect – approximately one and a half million dollars.

Q What is the –

A Excuse me, including interest.

Q Now the resolution that Lahontan operates under addresses – strike that.

Other than the Tahoe Keys subdivision, or planned unit development, what other subdivisions has Lahontan imposed a special mitigation fee for?

A I do not know.

Q To your knowledge, has Lahontan imposed any mitigation fee on any other residential subdivision in the Tahoe Basin?

A To my knowledge, which stems back two years, no. Can I come back to that point?

Q Yes, you may.

A Thank you. It is my understanding that when certain types of development which can be exempted from the prohibition of development are allowed to continue, or to be built, that there is some form of mitigation required in order to grant the exemption; and that the Lahontan Board has in fact granted exemptions to various public agencies to construct facilities that are allowed for and are exempted in

* * *

No. 94-486

Supreme Court, U.S.
OCT 3 1994
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1994

TAHOE KEYS PROPERTY OWNERS' ASSOCIATION, a California non-profit mutual benefit corporation,

Petitioner,

v.

CALIFORNIA STATE WATER RESOURCES CONTROL BOARD; CALIFORNIA STATE REGIONAL WATER QUALITY CONTROL BOARD – LAHONTAN REGION; CALIFORNIA STATE RESOURCES AGENCY; AND DOES 1 through 25, Inclusive,

Respondents.

On Petition For Writ Of Certiorari To The Court Of Appeal, State Of California

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a state appellate decision, which merely affirms a trial court's denial of a preliminary injunction, constitutes a "final judgment or decree" permitting review by this Court under 28 U.S.C. § 1257.

2. Whether this Court can or should review a state court's preliminary injunction denial which rests on the adequate and independent state law ground that petitioner's claims are likely barred by state procedural doctrines including estoppel and laches.

3. Whether the state court correctly found that a water pollution mitigation fee imposed as a condition of permitted development complied with the Takings Clause of the Fifth and Fourteenth Amendments where a) the fee proceeds may only be used to offset the polluting effects of the development, and b) the fee only partially compensates for the cost of offsetting that pollution.

PARTIES TO THE PROCEEDING BELOW

Respondents agree with petitioner's characterization of the parties below. However, petitioner named the State of California Resources Agency as a defendant in its trial court complaint, and as a respondent before this Court. Under California statute, the Secretary of the Resources Agency rather than the Resources Agency itself should have been named. (See footnote 1 of California Court of Appeal decision at Pet. App. 2.) Therefore, this brief refers to the Secretary, rather than to the Agency, as a respondent.

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No. 94-486

In The

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October Term, 1994

TAHOE KEYS PROPERTY OWNERS' ASSOCIATION, a California non-profit mutual benefit corporation,

Petitioner,

v.

CALIFORNIA STATE WATER RESOURCES CONTROL BOARD; CALIFORNIA STATE REGIONAL WATER QUALITY CONTROL BOARD – LAHONTAN REGION; CALIFORNIA STATE RESOURCES AGENCY; AND DOES 1 through 25, Inclusive,

Respondents.

On Petition For Writ Of Certiorari To The Court Of Appeal, State Of California

RESPONDENTS' BRIEF IN OPPOSITION

Respondents State of California Regional Water Quality Control Board – Lahontan Region (Lahontan) and Secretary of the Resources Agency (Secretary) respectfully request that this Court deny the petition of Tahoe Keys Property Owner's Association (TKPOA) for a writ of certiorari seeking review of the opinion of the Court of Appeal of the State of California, Third Appellate District.

JURISDICTION

This Court lacks jurisdiction because petitioner has not sought review of a final state court judgment or decree as required by 28 U.S.C. § 1257(a). Petitioner, rather, challenges an appellate state court decision affirming an interlocutory trial order: the denial of a preliminary injunction.

This Court also lacks jurisdiction herein because the state appellate decision rests on an adequate and independent state law ground.

STATEMENT OF THE CASE

Respondents incorporate by reference the facts as stated by the California Court of Appeal's decision below. Pet. App. 1-38. See ROBERT L. STERN ET AL., SUPREME COURT PRACTICE 373 (7th ed., 1993) (approving this practice).

In addition, respondents wish to correct two misstatements in the petition. First, TKPOA fails to disclose the key fact, fully noted by the court below, that the mitigation fee challenged herein was not proposed by respondents; ***it was instead proposed by TKPOA itself.*** Pet. App. 32. Moreover, ***TKPOA*** asked that the fee only be applied prospectively. *Ibid.*

Second, TKPOA asserts throughout its petition that the fee which it now opposes was solely imposed to mitigate the effects of ***past*** development activities. The court below, however, correctly found that the assertion was not supported by the record. Pet. App. 30. To the contrary, the record indicates that the vast majority of

pollution being mitigated comes from the *continuing* operation and maintenance of the lands and facilities at issue, not from past development. *Id.*, at 30-31.

REASONS FOR DENYING THE WRIT

The writ should be denied because the California Court of Appeal's decision is not a "final judgment." It is, rather, an interlocutory state court decision and therefore not reviewable under 28 U.S.C. § 1257. In addition, the decision below is not reviewable because it rests on an adequate and independent state law ground: petitioner lacked a reasonable probability of success on the merits since its claims are in all likelihood barred by state procedural doctrines that preclude stale and inequitable claims. Finally, even if these two critical jurisdictional defects did not exist, review should be denied because the decision below is highly fact-bound and because it correctly analyzes and applies pertinent constitutional principles.

I.

THIS COURT LACKS JURISDICTION BECAUSE NO FINAL JUDGMENT HAS BEEN RENDERED; THE STATE COURT OF APPEAL ONLY AFFIRMED A PRELIMINARY INJUNCTION DENIAL

Title 28 U.S.C. § 1257 expressly limits this Court's review of state court decisions to "[f]inal judgments or decrees." In the instant case, however, no final judgment or decree has been rendered. The California Court of

Appeal's decision merely affirms a preliminary injunction denial. Trial of the matter has yet to occur.

Petitioner conspicuously fails to address this basic, threshold jurisdictional requirement. This is fatal. "Upon application to this Court for review of the judgment of a state court it is the petitioner's burden to show affirmatively that we have jurisdiction." *Gorman* v. *Washington Univ.*, 316 U.S. 98, 101 (1942). Petitioner, however, has not even attempted to demonstrate finality.

Finality is not only required by statute; it is also central to the effective functioning of the courts. This Court has thus explained that the requirement "is not one of those technicalities to be easily scorned. It is an important factor in the smooth working of our federal system." *Radio Station WOW* v. *Johnson, Inc.*, 326 U.S. 120, 124 (1945).

The requirement applies to most state preliminary injunction decisions under "the salutary and long-standing rule that decisions upon interlocutory injunctions are not final judgments." *Construction Laborers* v. *Curry*, 371 U.S. 542, 552 (1962). There is a limited exception to this venerable rule: "The assertion by the state court of ***power*** to act in an interlocutory way is final. Whether it has that ***power*** may be determined without reference to any future proceedings which may be taken." *Montgomery Bldg. & Constr. Trades Council* v. *Ledbetter Erection Co.*, 344 U.S. 178, 181 (1952) (Douglas, J., dissenting) (emphases in original); *Curry*, 371 U.S. at 552.

The present case, however, does not fall within this limited exception. All parties agree that the state trial court has the power to issue a preliminary injunction

upon the requisite showings of probability of success on the merits and threatened harm. The only relevant issue on appeal to the state appellate court was whether those showings were made on the facts presented to the trial court. The decision below thus involves a classic interim determination which is not reviewable by this Court on certiorari.

II.

THE STATE COURT'S PRELIMINARY INJUNCTION DENIAL RESTS ON AN ADEQUATE AND INDEPENDENT STATE GROUND: PETITIONER'S CLAIMS ARE LIKELY BARRED BY STATE PROCEDURAL DOCTRINES WHICH PROHIBIT STALE AND UNFAIR CLAIMS

Even if the California Court of Appeal ruling had been final, review by this Court would still be unwarranted because the decision is fully supported on an independent state ground: state procedural doctrines will doubtlessly preclude TKPOA's claims. Review would also be unwarranted since these doctrines are very fact-specific; it is therefore unlikely that a ruling by this Court would have a significant impact beyond the parties to this lawsuit.

Under California law, preliminary injunction determinations fall within a trial court's "sound discretion." *Cohen* v. *Bd. of Supervisors*, 40 Cal.3d 277, 286, 219 Cal.Rptr. 467, 707 P.2d 840 (1985). To obtain a preliminary injunction, a party must establish, *inter alia*, that it has a reasonable probability of success on the merits. *Id.*, at 286-287.

Applying this test to the facts before it, the California Court of Appeal properly concluded that TKPOA is unlikely to prevail on the merits. In reaching this conclusion, the court found that the state law-based procedural defects in this case are so serious that "there is substantial doubt that TKPOA will even be allowed to proceed to the merits of its [federal] claim." Pet. App. 32. This finding, without more, fully justified denial of the requested preliminary injunction under California law. *Cohen*, 40 Cal.3d, at 286; *Jessen* v. *Keystone Savings & Loan Ass'n*, 142 Cal.App.3d 454, 459, 191 Cal.Rptr. 104 (1983).

Petitioner does not even acknowledge this state law basis of the California Court of Appeal's ruling. This Court, however, not only should not, but *cannot* review a state court decision supported by an adequate and independent state law ground. *Coleman* v. *Thompson*, 501 U.S. 722, 729 (1991). This rule is jurisdictional. *Ibid.*

As will be seen, the California Court of Appeal was fully correct in finding that TKPOA's lawsuit suffers from fundamental procedural flaws. TKPOA's claims are doubtlessly barred by the state law principles of estoppel, unclean hands, waiver, statutes of limitations and laches.

A. TKPOA's Challenge Of The Very Fee Which TKPOA Itself Proposed Is Likely Barred By State Law Doctrines Which Prohibit Unfair Claims (Estoppel, Unclean Hands And Waiver)

A critical fact which underscores the unfairness of TKPOA's lawsuit cannot be found in its petition. As pointedly noted by the court below, the fee which TKPOA now challenges ***was proposed by TKPOA itself***. Pet. App.

32. In addition, it was ***TKPOA*** which asked that the fee only be applied prospectively. *Ibid.* Nine years after its request was accepted by the state agencies, however, TKPOA decided to attack the fee in the present litigation, and to attack the fact that the fee is only prospectively applied.

Well-settled state law doctrines of estoppel and unclean hands, however, bar TKPOA from making these belated, unfair challenges. See *Edmonds* v. *County of Los Angeles*, 40 Cal.2d 642, 650, 255 P.2d 772 (1953) (equitable estoppel bars challenge of permit condition accepted by applicant); *Garamendi* v. *Mission Ins. Co.*, 15 Cal.App.4th 1277, 1289, 19 Cal.Rptr. 2d 190 (1993) (unclean hands bars relief where one induces state agency to act by failing to disclose material fact).

Lawsuits based upon this type of unjust conduct are also barred under California's rule of waiver. That rule was described in *Rossco Holdings, Inc.* v. *State of California*, 212 Cal.App.3d 642, 260 Cal.Rptr. 736 (1989), *cert. denied*, 494 U.S. 1080 (1990), as follows:

> "A landowner cannot challenge a condition imposed upon the granting of a permit after acquiescence in the condition by either specifically agreeing to the condition or failing to challenge its validity and accepting the benefits afforded by the permit." *Id.*, at 654.

TKPOA's claims thus directly contravene settled state doctrines that bar unfair claims.

B. TKPOA's Nine Year Old Claims Are Further Barred Because They Are Stale

The resolutions which TKPOA challenges were both adopted in 1982. Pet. App. 6-7. TKPOA, however, waited until 1991 to challenge the validity of those resolutions. Pet. App. 7-8. TKPOA cannot cite any statute which would allow claims that are so stale.[1]

TKPOA's claims began to run when the challenged resolutions were adopted. *Barancik* v. *County of Marin*, 872 F.2d 834, 836 (CA9 1988), *cert. denied*, 493 U.S. 894 (1989) (claims that ordinances are invalid accrue when the ordinances are adopted); also see *Soderling* v. *City of Santa Monica*, 142 Cal.App.3d 501, 505, 191 Cal.Rptr. 140 (1983) (claims accrue when contested conditions are first imposed by a tentative map approval, not the future date on which the final map is reviewed). Any constitutional infirmities, and the economic impact on members' parcels, occurred in 1982, when the resolutions were adopted. TKPOA, however, waited nine years to file its lawsuit. The action is therefore untimely.

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[1] TKPOA's claims for alleged due process and equal protection violations are subject to a one year limitations period. See *Usher* v. *City of Los Angeles*, 828 F.2d 556, 558 (CA9 1987). Its particular inverse condemnation claims and allegations of regulatory infirmities come under the catch-all four year limitations period of California Code of Civil Procedure section 343. Even an assertion that TKPOA's inverse condemnation claim is subject to the five year period for physical invasions of property (see *Otay Water Dist.* v. *Beckwith*, 1 Cal.App.4th 1041, 1048, 3 Cal.Rptr. 2d 223 (1991)) would not help TKPOA, since its lawsuit would still have been filed four years too late.

TKPOA's claims are independently stale under California's doctrine of laches. Laches applies where there has been unreasonable delay in filing suit, plus prejudice to the defendant resulting from delay. See *Northridge Hosp. Found.* v. *Pic 'N' Save No. 9, Inc.*, 187 Cal.App.3d 1088, 1101, 232 Cal.Rptr. 329 (1986).

This is a classic laches case. TKPOA's extraordinary delay in filing suit was unreasonable. TKPOA was aware of all key facts back in 1982, and could have filed a virtually identical complaint at that time. Instead, for nine years TKPOA sat on whatever rights it had. Moreover, TKPOA's delay caused significant prejudice. Lahontan and the Secretary spent an untold number of hours (and taxpayers' dollars) on studies and workshops which analyzed mitigation fee projects. Pet. App. 9, fn. 7. Rather than seeking to block those activities, TKPOA was an active participant. *Ibid.* Then, after those tax dollars were spent, TKPOA inexplicably filed suit.

The California Court of Appeal's finding that TKPOA is unlikely to prevail on the merits is thus well supported by an adequate and independent state law ground. TKPOA's challenges are in all probability barred by established state procedural doctrines which preclude unfair and stale claims.

III.

THE CALIFORNIA COURT OF APPEAL DECISION IS FULLY CONSISTENT WITH *NOLLAN* AND *DOLAN*

TKPOA argues that the test used by the California Court of Appeal in reviewing the mitigation fee's constitutionality conflicts with the standard used in *Nollan* v. *California Coastal Comm'n*, 483 U.S. 825 (1987) and *Dolan* v. *City of Tigard*, 512 U.S. ___, 114 S.Ct. 2309 (1994). However, the appellate determination is fully consistent with those decisions.

Dolan held that two questions must be answered in reviewing whether permit conditions that require property dedications violate the Takings Clause of the Fifth Amendment of the United States Constitution. First, does an "essential nexus" exist between a "legitimate state interest" and the permit condition exacted by the [public entity]? *Dolan*, 114 S.Ct., at 2317. This was the question addressed in *Nollan*. *Ibid.* If that requisite connection exists, the court needs to answer a second question: is the condition "roughly proportional" to the development's impact? *Id.*, at 2319.

The California Court of Appeal applied this analysis. It expressly found that the *Nollan* "essential nexus" exists as follows:

> "Since the state's justification for the imposition of a mitigation fee upon Tahoe Keys property owners was to ameliorate the effects of pollution from the Tahoe Keys development, there can be no doubt that justification for the regulation at issue here does constitute an important state

> interest reasonably related to the development and build out of the Tahoe Keys." Pet. App. 25.

The court also properly applied the second part of the *Dolan* test, and found that the fee was based upon appropriate calculations:

> "The mitigation fee charged to TKPOA's members was calculated based upon estimates of the quantities of nutrients entering Lake Tahoe as a result of the development and continuing maintenance and operation of the Tahoe Keys subdivisions and lagoons. And the mitigation fund was specifically dedicated to partial mitigation of the effects of that source of pollution through projects to abate or at least offset the polluting effects of the Tahoe Keys." Pet. App. 25-26.

Thus, even if the California Court of Appeal decision had been a final judgment, and even if it had turned on federal grounds, certiorari would not be warranted because the decision is fully consistent with this Court's precedents in *Nollan* and *Dolan*.

CONCLUSION

The petition for writ of certiorari should be denied.

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Respectfully submitted,

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